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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 690

JOHN W. PORTER, JR and JNO. W. PORTER also known as JOHN W. PORTER, both individually and as sole partners doing business as the law firm of Porter & Porter,

Petitioners.

VERSUS

OKLAHOMA BACONE COLLEGE TRUST, JOHN BROWN UNIVERSITY, TEXAS CHRISTIAN UNIVERSITY, TEXAS WESLEYAN COLLEGE, UNIVERSITY OF TEXAS, TEXAS A. & M. COLLEGE, SOUTHERN METHODIST UNIVERSITY, BAYLOR UNIVERSITY, OKLAHOMA A. & M. COLLEGE now OKLAHOMA STATE UNIVERSITY, UNIVERSITY OF OKLAHOMA, THE GENERAL BOARD OF EDUCATION OF THE METHODIST CHURCH OF NASHVILLE, TENNESSEE, FIRST NATIONAL BANK IN DALLAS as Independent Executor of the Estate (in Texas) of Murray Case Sells, deceased, THE FIRST NATIONAL BANK AND TRUST COMPANY OF MUSKOGEE as Administrator with Will and Codicil annexed of the Estate (in Oklahoma) of Murray Case Sells, deceased, BRUCE BENNETT as Attorney General of the State of Arkansas, MAC Q. WILLIAMSON as Attorney General of The State of Oklahoma, and WILL WILSON as Attorney General of the State of Texas,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

JOHN W. PORTER, JR. of
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February, 1960.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 8-8780

SUBJECT INDEX

	PAGE
Explanation as to Record	2
Reference to Opinions and Proceedings Below	3
Jurisdiction:	
The jurisdiction of this Supreme Court of the United States is invoked herein pursuant to Section 1257(3) of Title 28 of the United States Code, and pursuant to the "Due process of law" Clauses (Am. 5, Am. 14) and the "Full faith and credit" Clause (Art. 4) of the Constitution of the United States	7-8
Questions Presented	8
Constitutional Provisions Claimed Violated	13
Statement	13
Reasons for Granting Writ of Certiorari	20

AUTHORITIES CITED

CASES:

Bridgman v. Moore, 143 Tex. 250, 183 S.W.2d 705	18
Bruce v. Republic (Texas), 74 S.W.2d 461	17
Cheney v. Norton (Texas), 126 S.W.2d 1011	18
Commander v. Bryan (Texas), 123 S.W.2d 1008	18
Cook v. Morrison, 202 Okla. 693, 217 P.2d 810	17
Cuthbert v. Chauvet, 136 N.Y. 326, 32 N.E. 1088	17
Estin v. Estin, 334 U.S. 541, 92 L. Ed. 1561	18
Griffin v. Griffin, 327 U.S. 220, 90 L. Ed. 635	18
Hansberry v. Lee, 311 U.S. 32, 85 L. Ed. 22	18

INDEX CONTINUED

	PAGE
Hill v. Hill, 59 Okla. 424, 152 Pac. 1122	17
Livingston v. Livingston (Iowa), 153 N.W. 200	17
Logan v. Thompson (Texas), 202 S.W.2d 212	18
Moore v. Moore (Texas), 259 S.W. 322	19
Moore v. Stark (Texas), 17 S.W.2d 1037	18
Morris v. Boyd (Ark.), 162 S.W. 69	17
Murphey v. Dalton (Mo.), 314 S.W.2d 726	20
Pendleton v. Hare (Texas), 231 S.W. 334	20
Porter's Estate, In re, 183 Okla. 511, 83 P.2d 541	11
Stenzel v. Fisher (Texas), 195 S.W.2d 254	18
Thompson v. Whitman, 85 U.S. 457, 21 L. Ed. 897	18
Virginia v. Columbia, 84 U.S. 521, 21 L. Ed. 687	18

CONSTITUTIONAL PROVISIONS:

Constitution of the United States:	
Article IV, Section 1	13
Article IV, Section 2	13
14th Amendment, Section 1	13

STATUTES:

Title 12, Okla. Stat. Ann., Secs. 956.1, 956.2, 956.3, 956.10	2
Title 58, Okla. Stat. Ann., Sec. 553	11

MISCELLANEOUS:

49 C.J.S., "Judgments", Sec. 19(d), p. 49	18
49 C.J.S., "Judgments", Sec. 267, p. 480, Sec. 449, pp. 878-880	18
49 C.J.S., "Judgments", pp. 735, 861	19
89 C.J.S., "Trusts", Sec. 95, pp. 936-937	18
90 C.J.S., "Trusts", Sec. 246, pp. 220, 223	18
95 C.J.S., "Wills", Sec. 325(b), p. 162, Sec. 329, p. 176	18
Rules of the Supreme Court of the State of Oklahoma, Rule 15	2

INDEX CONTINUED PAGE

APPENDIX

Decree of Distribution—In the Matter of the Estate of Murray Case Sells, deceased, No. 9069—In the County Court of Muskogee County, State of Oklahoma ..... i-v

Decree—In the Matter of the Estate of Murray Case Sells, deceased, No. 36527—In the District Court Within and For Muskogee County, State of Oklahoma ..... v-vi

Motion for Oral Argument, In the Case of John W. Porter, Jr., et al., Plaintiffs in Error v. Oklahoma Bacone College Trust; et al., Defendants in Error, No. 37996 and No. 38271, ... vi-viii

Syllabus by the Supreme Court of the State of Oklahoma in the Case of John W. Porter, Jr., and Jno. W. Porter, etc., Plaintiffs in Error v. The Oklahoma Bacone College Trust, et al., Defendants in Error, No. 37996—Filed in the Supreme Court of Oklahoma, September 29, 1959 ..... ix-xiv

Order of the Supreme Court of the State of Oklahoma, Denying Application for leave to file Second Petition for Rehearing in the Case of John W. Porter, Jr., et al. v. The Oklahoma Bacone College Trust, et al., No. 37996—and No. 37271—Filed in the Supreme Court of Oklahoma, November 24, 1959 xv

Order of the District Court of Muskogee County, Oklahoma, on Hearing Motion to Dismiss and Demurrer, in the Case of Oklahoma Bacone College Trust, et al., Plaintiffs v. John W. Porter, Jr., et al., Defendants, No. 36586 xvi

INDEX CONTINUED PAGE

Order of District Court of Muskogee County, Oklahoma, on Motion to Dismiss for Want of Jurisdiction—Filed by Attorney General of the States of Texas, Arkansas, and Oklahoma to the Various Cross-Actions filed herein by Defendants Porter & Porter in the Case of Oklahoma Bacone College Trust, et al. v. John W. Porter, Jr., et al., No. 36586 xvii

Judgment of the District Court of Muskogee County, State of Oklahoma, in the Case of Oklahoma Bacone College Trust, et al. v. John W. Porter, Jr., et al., No. 38271 xviii-xix

Syllabus by the Supreme Court of the State of Oklahoma, in the Case of John W. Porter, Jr., etc. v. Oklahoma Bacone College Trust, et al., No. 38271—Filed in the Supreme Court of Oklahoma, September 29, 1959 xx-xxxiv

Application for Rehearing, in Causes No. 37996 and No. 38271—Filed in the Supreme Court of Oklahoma xxxiv

Order Staying the Enforcement of Mandate, Filed in Supreme Court of Oklahoma, December 7, 1959 xxxv-xxxvi

Porter Exhibit 5—Letter from Dean of Baylor Law School xxxvii

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JOHN W. PORTER, JR and JNO. W. PORTER also known as JOHN W. PORTER; both individually and as sole partners doing business as the law firm of Porter & Porter,

Petitioners,

VERSUS

OKLAHOMA BACONE COLLEGE TRUST, JOHN BROWN UNIVERSITY, TEXAS CHRISTIAN UNIVERSITY, TEXAS WESLEYAN COLLEGE, UNIVERSITY OF TEXAS, TEXAS A. & M. COLLEGE, SOUTHERN METHODIST UNIVERSITY, BAYLOR UNIVERSITY, OKLAHOMA A. & M. COLLEGE now OKLAHOMA STATE UNIVERSITY, UNIVERSITY OF OKLAHOMA, THE GENERAL BOARD OF EDUCATION OF THE METHODIST CHURCH OF NASHVILLE, TENNESSEE, FIRST NATIONAL BANK IN DALLAS as Independent Executor of the Estate (in Texas) of Murray Case Sells, deceased, THE FIRST NATIONAL BANK AND TRUST COMPANY OF MUSKOGEE as Administrator with Will and Codicil annexed of the Estate (in Oklahoma) of Murray Case Sells, deceased, BRUCE BENNETT as Attorney General of the State of Arkansas, MAC Q. WILLIAMSON as Attorney General of The State of Oklahoma, and WILL WILSON as Attorney General of the State of Texas.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the petitioners herein, John W. Porter, Jr. and Jno. W. Porter also known as John W. Porter, both

individually and also as sole partners doing business as the law firm of Porter & Porter, in all their capacities, and pray this Supreme Court of the United States to issue a writ of certiorari to the Supreme Court of the State of Oklahoma to review its judgments (opinions) rendered on September 29, 1959 in its companion cases No. 37996 and No. 38271, wherein petitioners were plaintiffs in error and the respondents were defendants in error. Said judgments (opinions) affirmed trial court's decisions therein adverse to petitioners, wrongfully destroying a charitable trust in the form of a Codicil, wherein petitioners were "watchdog" trustees; and wrongfully refusing to consider petitioners' attorney fee claim protected by said Codicil for their legal counsel and advice in representing the respondent Independent Executor in the estate involved.

EXPLANATION AS TO RECORD

Beside petitioners' typed petitions in error filed in the Supreme Court of the State of Oklahoma in said companion cases, the only records or appeal records ever before said Supreme Court of the State of Oklahoma therein, consisted only of the uncontradicted narrative statements contained in the printed briefs of the parties on file in said two companion cases therein (No. 37996 and No. 38271) as to what happened in the trial courts. This is so by the authority of the laws of the State of Oklahoma cited as; Title 12 of the Oklahoma Statutes Annotated, Sections 956.1, 956.2, 956.3 and 956.10, and also by the authority of Rule 15 of the Rules of the Supreme Court of the State of Oklahoma, cited as "Title 12 of the Oklahoma Statutes Annotated, Chapter 15, Appendix." The points urged in said

petitions in error are repeated in said briefs of petitioners. Petitioners are therefore having ten (10) copies of all such briefs certified by the Clerk of the Supreme Court of the State of Oklahoma up to the Clerk of this Supreme Court of the United States as the record herein together with certified copies of said September 29, 1959 judgments, petitioners' motions for oral arguments and applications for rehearings and the orders overruling applications for rehearings and staying enforcement of mandates of said Supreme Court of Oklahoma herein. The Clerk of this Supreme Court of the United States has given petitioners written assurance such would be an acceptable record herein. Petitioners' narrative statements contained in their said printed briefs were uncontradicted by the opposing printed briefs, and so constitute the established facts on which review was had herein in the Supreme Court of the State of Oklahoma. Reference will be made herein to the Appendix hereto, and to these printed briefs as the appeal or review record for this petition. The Will and Codicil are shown in the ancillary administrator's brief in No. 37996, and the other pertinent facts are in the briefs of plaintiffs in error (petitioners) in both cases.

REFERENCE TO OPINIONS AND PROCEEDINGS BELOW

Said companion Case No. 37996 originated in the County Court of Muskogee County, Oklahoma in its Case No. 9069 in the ancillary probate of the Will and Codicil of Murray Case Sells, deceased. Ancillary administration of the estate real property in Oklahoma, and particularly in Muskogee County, Oklahoma, had been completed and

the estate converted to cash. Respondents, except the ancillary administrator, then on June 21, 1957, petitioned said County Court for distribution of this cash estate asset direct to the colleges and universities under the Will and ignoring the later Codicil, alleging as reason therefor that the Codicil had been adjudged cancelled in the domiciliary probate in the County Court of Gregg County, Texas. They also alleged the Codicil was incontestable in Oklahoma. Their petition is on page 3 of petitioners' said brief in No. 37996. Petitioners objected on various grounds and tried to uphold the Codicil. Said objections are on page 7 of said brief. But on trial July 16, 1957, petitioners were overruled and the petitioning respondents were sustained by the court's decree that date distributing the cash assets direct to the colleges and universities ignoring the Codicil. This decree is on pages i-v of the Appendix, and also on page 10 of said brief. Petitioners appealed from this decree of distribution to the District Court of Muskogee County, Oklahoma in its Case No. 36527, where on *trial de novo* it was affirmed by the decree of said District Court on August 20, 1957. This affirming decree is on pages v-vi of the Appendix, and also on page 14 of said brief. After petitioners' motion for new trial was heard and overruled, they appealed to the Supreme Court of the State of Oklahoma in its said companion Case No. 37996, and the ancillary administrator filed its printed brief therein supporting same. Petitioners then filed their motion for oral argument therein on their final printed briefing on September 11, 1958. A part of this motion is quoted in the Appendix at pages vi-viii. This motion was granted without opposition and the case accordingly argued before the full court.

Thereafter on September 29, 1959, this Supreme Court of the State of Oklahoma rendered its opinion (judgment) in said companion Case No. 37996 against petitioners and the ancillary administrator, and for respondents, affirming the trial court's holdings. This affirming opinion is on pages ix-xiv of the Appendix, and is also reported in the national reporter system (Pacific Reporter, second series, by West Publishing Co.) at 346 P.2d 335. The ancillary administrator then gave up the fight. Petitioners however, timely applied for rehearings thereon, but were denied finally by that court's order made November 24, 1959, a copy of which is in Appendix page xv. Portions of their applications for rehearing are quoted in the Appendix at pages xxxiv-xxxv. Thereafter on petitioners' motion, the Supreme Court of the State of Oklahoma entered its order in said Companion Case No. 37996 on December 7, 1959, staying without bond the enforcement of its mandate therein pending review herein by the Supreme Court of the United States and granting petitioners until March 15, 1960 to file their petition for writ of certiorari herein to that end. This order is on pages xxxv-xxxvi of the Appendix.

Said companion Case No. 38271 originated September 12, 1957 in the District Court of Muskogee County, Oklahoma as its Case No. 38271. It was instituted by respondents, except the ancillary administrator, as a purely equity case to further sanction what they were doing in the above mentioned ancillary probate case and what they had done in Texas. They petitioned said District Court to adjudge the Codicil probated in Oklahoma to be inoperative and of no effect, alleging as reason therefor that the Codicil had been adjudged cancelled in the domiciliary probate

in the County Court of Gregg County, Texas. They also alleged however, that the Codicil was incontestable in Oklahoma. This petition is on page 4 of petitioners' said reply brief in No. 38271. The ancillary administrator answered attempting to defend and uphold the Codicil. Petitioners answered also attempting to defend and uphold the Codicil, and they further filed counter claims and cross-claims as "watchdog" trustees under the Codicil seeking to recoup for the charitable trust of the Codicil all that had been wrongfully paid out or distributed from the estate in Texas, alleging the facts thereof, and also as attorneys claiming against the Independent Executor their attorney fee for representing it in the Texas estate probate and administration, and they further claimed that the Attorneys General should be using their respective offices to defend and not to destroy the charitable trust provided in the Codicil. Petitioners' initial answer and counter-claim is on page 7 of said reply brief. Said District Court then on March 24, 1958, dismissed on the pleadings as not germane the attorney fee claim as well as the claim against the Attorneys General; and proceeded to try the balance of the issues and claims, resulting in its judgment on March 25, 1958 against petitioners and the ancillary administrator, and in favor of respondents, adjudging the Codicil of no effect in Oklahoma because of the adjudged cancellation thereof in Texas. These March 24, 1958 dismissals on pleadings, are on pages xvi-xvii of the Appendix and this March 25, 1958 judgment is on pages xviii-xix of said Appendix. The ancillary administrator then gave up the fight at this point. However, after their motion for new trial was heard and overruled, petitioners appealed to the

Supreme Court of the State of Oklahoma in its said companion Case No. 38271. Petitioners then filed their motion for oral argument therein at the same time of their initial printed brief on September 11, 1958. This motion was granted without opposition, and the case accordingly argued before the full court along with the other companion case. A part of this motion is quoted in the Appendix at pages vi-viii. Thereafter on September 29, 1959, this Supreme Court of the State of Oklahoma rendered its opinion (judgment) in said companion Case No. 38271, against petitioners and the ancillary administrator, and for respondents, affirming the trial court holdings. This affirming opinion is on pages xx-xxxiv of the Appendix, and is also reported in the national reporter system (Pacific Reporter, second series, by West Publishing Co.) at 346 P.2d 328. Petitioners then timely applied for rehearings thereon, but were denied finally by that court's order made November 24, 1959, a copy of which is in Appendix, page xv. Portions of these applications are quoted on pages xxxiv-xxxv of the Appendix. Thereafter on petitioners' motion, the Supreme Court of the State of Oklahoma entered its order in said companion Case No. 38271 on December 7, 1959, staying without bond the enforcement of its mandate therein pending review herein by the Supreme Court of the United States, and granting petitioners until March 15, 1960 to file their petition for writ of certiorari herein to that end. This order is on pages xxxv-xxxvi of the Appendix.

JURISDICTION

The jurisdiction of this Supreme Court of the United States is invoked herein pursuant to Section 1257(3) of Title 28 of the United States Code, and pursuant to the

"Due process of law" Clauses (Am. 5, Am. 14) and the "Full faith and credit" Clause (Art. 4) of the Constitution of the United States.

QUESTIONS PRESENTED

(1) Can a Texas court judgment, void for lack of persons interested seeking it, appearing on the face of its record introduced in evidence in the Oklahoma courts herein, wherein a Codicil containing a charitable trust was adjudged cancelled in the domiciliary probate in Texas; be given full faith and credit in said Oklahoma courts to the substantial damage and prejudice of those (petitioners and student beneficiaries) provided for in said Codicil, who had no day in court in said Texas matter? This Texas judgment was absolutely void on the face of its record. Does this not violate petitioners' and said students' Federal Constitutional rights as to due process of law, and full faith and credit in Oklahoma as well as Texas? Petitioners, in their capacity as "watchdog" trustees provided for in the Codicil, were empowered and directed to supervise and oversee the principal trustee bank and the subordinate trustee colleges and universities therein named, for the obvious benefit of the real beneficiaries of the charitable trust involved, to wit: the "deserving young men and women" students therein provided for. Petitioners, in this trust capacity, took no part and made no appearance or agreement in said Texas matter, and so they had no day in court there on behalf of said "deserving young men and women" students to defend and uphold the Codicil. Petitioners were also attorneys for the Independent Executor in Texas, along with said Independent Executor's

regular bank attorney Rosser J. Coke, and the Codicil provided for the payment of their earned attorney fees in this capacity of attorneys. One of petitioners (Jno. W. Porter), as such attorney, was present in said Texas matter, along with said Coke, but he was there only as attorney and spokesman for his client the Independent Executor. His views were contrary to the views of his client and Coke, and they knew thereof. He had advised his client and Coke to defend and uphold the Codicil in Texas, but his client saw fit to make no such defense, and accordingly instructed him and Coke as its attorneys to agree to the cancellation of the Codicil in its behalf without defense there in Texas, to save its own skin. He therefore had no day in court there to protect in his own behalf the attorney fee payment provisions of the Codicil. He was under a disability in that respect. He knew, however, that the Texas judgment would be void on its face for lack of jurisdiction, because there was no person interested seeking such judgment. The contesting heirs seeking the judgment had no interest in cancelling the Codicil alone. They testified for the Will and against the Codicil, but the Codicil by itself did not stand in their way to inherit. However, the Oklahoma courts herein gave full faith and credit to said Texas judgment, and ruled it had the effect of cancelling the Codicil also probated in Oklahoma, and was binding on all

(2) Can a Texas court judgment, void for being against public policy appearing on the face of its record introduced in evidence in the Oklahoma courts herein, wherein a Codicil containing a charitable trust was adjudged cancelled in the domiciliary probate in Texas;

be given full faith and credit in said Oklahoma courts to the substantial damage and prejudice of those (petitioners and student beneficiaries) provided for in said Codicil, who had no day in court in said Texas matter? This Texas judgment was absolutely void on the face of its record. Does this not violate petitioners' and said students' Federal Constitutional rights as to due process of law and full faith and credit? The record of the Texas judgment shows that the Codicil was for the benefit and protection of "deserving young men and women" student beneficiaries of a rather large estate ($10,000,000). This record further shows that the Codicil was being attacked in a contest by heirs. This record further shows that those whose duty it was under law to defend and uphold the Codicil, were in court in that Texas matter. It further shows they made no defense of the Codicil, and in fact agreed to its cancellation. They were the Independent Executor in Texas, the 10 colleges and universities and the contingent trust beneficiary Methodist Church Board named in the Codicil, and the Attorneys General of Texas and Oklahoma. The student beneficiaries provided for in the Codicil were not in court, and neither were their "watchdog" trustees, and no one there attempted to defend the Codicil or their interests or benefits under the Codicil. Does this not violate public policy? Does this not make the Texas judgment void on the face of its record? Can such judgment be received with full faith and credit anywhere? Is such judgment binding on said student beneficiaries or any one else? Is such agreement to cancellation binding on said student beneficiaries or any one else? The Oklahoma courts herein gave full faith and credit to said Texas judgment, and ruled it had the effect of cancelling the Codicil also probated in Okla-

homa, and that it was binding as to all, and that the agreement to cancellation was binding as to all whether they were parties thereto or not.

(3) Can the County Court of Muskogee County, Oklahoma herein decree distribution and close the ancillary administration of the Oklahoma portion of the estate involved, without the giving of the required jurisdictional notice by publication and by mailing provided by law?

"Every account for the final settlement and distribution of an estate shall stand for hearing at a date to be fixed by the county judge, not less than twenty (20) days after the filing thereof; and notice of such hearing shall be given by mailing written or printed copies of the notice of such hearing to the heirs, legatees and devisees whose addresses are known, and deposited in the post office with the postage thereon prepaid, at least ten (10) days before the hearing, and said notice of such hearing shall also be given by publication for two (2) successive weeks in some newspaper of general circulation published in the county, showing the name of the decedent and of the executor or administrator, the date of the hearing, and that such account is for final settlement and distribution—" Title 58, Okla. Stat. Ann., Sec. 553.

In re Porter's Estate, 183 Okla. 511, 83 P.2d 541. Petitioners were made parties to this Oklahoma distribution, and their rights and objections were adversely adjudged therein. This lack of jurisdictional notice to all concerned (all persons interested) was one of their objections. Does this quoted law on notice contemplate a single proceeding to settle all objections and exceptions to a distribution and closing of an estate, or does it contemplate repeated piecemeal proceedings with only some of the persons interested

notified each time? Petitioners feel that this law contemplates that a final account may be heard and settled in one proceeding with proper notice to all concerned as the law provides, and that the assets of an estate may be distributed and the estate closed in a separate proceeding with proper notice to all concerned as the law provides, or that the two proceedings may be merged under one notice. However, they feel that in either event the court lacks jurisdiction of the subject of the action unless the required notice by publication and by mailing to all concerned has been given. The mailing might be waived only if all appeared who were known heirs or legatees, but not otherwise. The record herein shows that the notice by publication was not given at all as to the distribution respondents sought. Therefore petitioners' rights and objections have not been adjudged as to unknown heirs and others contemplated by a public notice. The record herein shows that none of the heirs or special legatees whose names and addresses were given in the Will were present or were mailed or given any kind of notice, and so petitioners' rights and objections have not been adjudged as to them, or vice versa. One of the named heirs had died before the testator, but it has not been adjudged which one. Does all this not violate the due process of law provisions of the 14th Amendment of the Federal Constitution, to the prejudice of petitioners? They feel they and the student beneficiaries provided for in the Codicil are entitled to the benefit and protection of the law to have all concerned in this matter either in court or properly notified to the end of binding all concerned in this one proceeding. Is that not the meaning of the Oklahoma law and the holding of *In re Porter's Estate, supra*?

CONSTITUTIONAL PROVISIONS CLAIMED VIOLATED

In addition to the above quoted State law of Oklahoma as to due process of law by notice, petitioners' main complaint is that the following provisions of the Constitution of the United States (Federal Constitution) were violated to their damage and prejudice herein in all capacities, and to the damage and prejudice of the students for whom they speak:

"Article IV. Section 1. Full faith and Credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

"Section 2. The Citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

"Amendment 14, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The two companion cases sought to be reviewed herein involve the handling and administration in Texas and Oklahoma of the estate of Murray Case Sells, deceased. The

net value of the Texas portion totaled some $10,000,000.00, and the net value of the Oklahoma portion totaled $81,657.58. The Texas portion was composed of practically all the stock in an Oklahoma corporation, Sells Petroleum Incorporated, doing oil and gas exploration and recovery business primarily in Texas, Louisiana and Mississippi, with head business offices at the testator's domocile in Gregg County, Texas. The Oklahoma portion was composed mostly of real property in Muskogee County, Oklahoma, where the testator had previously lived and formed his said corporation.

Sells had had his trusted friend Jno. W. Porter (petitioner) form his said corporation in Oklahoma on July 26, 1929. He also had Porter draft his Will herein dated November 22, 1950, and his Codicil herein dated May 24, 1951. Jno. W. Porter (petitioner) and his designated successor (petitioner John W. Porter, Jr.) in case of death or disability, were assigned certain duties under paragraph XVIII of the Will and paragraphs numbered 6 and 29 of the Codicil. Two of these assignments in said paragraph 29 were perhaps only precatory—legal counsel for the Independent Executor—and legal counsel for the principal trustee bank. But the assignment in the balance of said paragraph 29, taken together with said paragraph 6, shows a clear intent of the testator to assign and designate his friend Porter and successor as supervising or "watchdog" trustees, to supervise and check on the principal trustee bank and the subordinate trustee colleges and universities named, to assure the faithful performance of the charitable trust provided.

All the facts and contentions relied upon in the lower courts herein, are set out and narrated in said printed briefs of petitioners (plaintiffs in error) in said two companion Cases No. 37996 and No. 38271, which constitute the appeal record herein. Reference is therefore made thereto for a more complete understanding of said cases and what took place and why. Said appeal record does include petitioners' motions for oral argument or applications for rehearing in the Supreme Court of the State of Oklahoma in said cases, and the pertinent portions of those instruments are quoted in the Appendix at pages vi-viii, xxxiv-xxxv.

Sells died on February 8, 1953, a resident of Gregg County, Texas. His Will and Codicil were admitted to and adjudged probated in the County Court of Gregg County, Texas in the domiciliary probate on March 10, 1953, and the Independent Executor then appointed. His Will and Codicil were admitted to and adjudged probated in the County Court of Muskogee County, Oklahoma in the ancilliary probate on June 11, 1953, in its Case No. 9069, and the ancillary administrator then appointed.

Petitioners of Muskogee, Oklahoma and Rosser J. Coke of the First National Bank in Dallas, Texas, were employed as legal counsel by the Independent Executor in Texas. The Independent Executor became increasingly negligent and arbitrary in its handling and administration of the Texas portion of the estate, contrary to the legal counsel and advice of petitioners. The Texas probate was contested on two occasions, by various heirs of Sells. The first was settled, contrary to the legal counsel and advice of petitioners, by the Independent Executor paying the contestants

$500,000.00. During the second contest, the colleges and universities named in the Will and Codicil threatened to sue the Independent Executor for $2,000,000.00, alleged negligence damage in the estate administration and handling, and seek its removal from office as Independent Executor and principal trustee, if it would not agree to an unopposed contest of the Codicil in this second contest, and turn over the estate assets to them direct solely under the Will and intact. The Independent Executor so agreed, in order to save its own skin. The colleges and universities then told the contestants in this second contest that they would see to it that the Independent Executor paid them $750,000.00 as a settlement of the contest, provided the contestants would contest and testify against only the Codicil, so that the Codicil would be knocked out. The contestants agreed to this. Petitioners as attorneys had given their legal counsel and advice to the Independent Executor to defend and uphold both the Will and Codicil, and had assured it and shown it how such could be done, but it refused to act thereon and persisted in the agreement to have the Codicil cancelled to save its own skin. Petitioners in their "watchdog" trust capacities were then in a very embarrassing spot. They were innocently caught in the cross-fire of a fight between the Independent Executor and the colleges and universities. The Independent Executor had put itself in an embarrassing spot by its own negligence, and the colleges and universities took advantage of the situation to get the estate under the Will and intact without the supervision of the Codicil. Before this second contest "trial", the colleges and universities and Independent Executor made a thorough Sells heirship in-

vestigation to guard against any more such contests. And so there was no legitimate cause to have the Codicil cancelled. The only parties in this second contest "trial" were the contesting heirs, the Independent Executor, the 10 colleges and universities, the Attorneys General of Texas and Oklahoma, and the contingent residuary trust beneficiary under the Codicil named as the General Board of Education of the Methodist Church of Nashville, Tennessee, and they all agreed to this unopposed contest Codicil cancellation settlement scheme. And this scheme was fully carried out in the "trial" of this second contest in the County Court of Gregg County, Texas on June 22, 1956, resulting in that court's judgment that date upholding the Will and cancelling the Codicil, primarily on the testimony of the contestant Gertrude Parker. She was a beneficiary under the Will and a subscribing witness on the Codicil. She had previously given a proof of probate affidavit in support of the Codicil. The Independent Executor knew this, but stuck with the agreed scheme. There was no opposition and no cross-examination as per the agreement. Under these circumstances, petitioners' only consolation was that they were convinced that the cancellation scheme and the resulting cancellation judgment were void on the face of the record, for being in violation of public policy, as well as for lack of persons interested seeking the cancellation judgment. In this connection petitioners relied on the authority of—*Hill* v. *Hill*, 59 Okla. 424, 152 Pac. 1122; *Cook* v. *Morrison*, 202 Okla. 693, 217 P.2d 810; *Bruce* v. *Republic* (Texas), 74 S.W.2d 461; *Morris* v. *Boyd* (Ark.), 162 S.W. 69; *Cuthbert* v. *Chauvet*, 136 N.Y. 326, 32 N.E. 1088; *Livingston* v. *Livingston* (Iowa), 153 N.W. 200;

Moore v. *Stark* (Texas), 17 S.W.2d 1037; *Stenzel* v. *Fisher* (Texas), 195 S.W.2d 254; *Logan* v. *Thompson* (Texas), 202 S.W.2d 212; 95 C.J.S. "Wills", Sec. 325(b) p. 162, Sec. 329, p. 176, and 49 C.J.S. "Judgments", Sec. 19(d), p. 49. They also relied on the authority that the fiduciary parties to this scheme were powerless to make any binding agreement in violation of their duties to defend the Codicil (89 C.J.S. "Trusts", Sec. 95, pp. 936-937; 90 C.J.S. "Trusts", Sec. 246, pp. 220, 223). They also relied on the authority that such a void judgment could be shown to be such, and overthrown at any time and any place, and could certainly not be *res judicata* on any basis (49 C.J.S. "Judgments", Sec. 267, p. 480, Sec. 449, pp. 878-880; *Cheney* v. *Norton* (Texas), 126 S.W.2d 1011; *Commander* v. *Bryan* (Texas), 123 S.W.2d 1008; *Bridgman* v. *Moore*, 143 Tex. 250, 183 S.W.2d 705). They also relied on the authority that such a void judgment violated the due process of law provisions of the Federal Constitution, and that such could not be received in any other court against them or said student beneficiaries as it would violate the Federal Constitutional clause as to full faith and credit of judgments (*Thompson* v. *Whitman*, 85 U.S. 457, 21 L. Ed. 897; *Hansberry* v. *Lee*, 311 U.S. 32, 85 L. Ed. 22; *Estin* v. *Estin*, 334 U.S. 541, 92 L. Ed. 1561; *Virginia* v. *Columbia*, 84 U.S. 521, 21 L. Ed. 687; *Griffin* v. *Griffin*, 327 U.S 220, 90 L. Ed. 635).

Later on, when the two (2) Oklahoma proceedings were instituted by respondents herein, seeking the Oklahoma portion of the estate ignoring the Codicil, petitioners pleaded and proved all of the above facts as shown in their said printed briefs, and by cross-claims and counterclaims petitioners sought their attorney fee, and also as

"watchdog" trustees, sought recoupment and recovery of the estate assets for the Codicil trust. But in spite of that, the void Texas judgment was received in the Oklahoma courts herein as *res judicata* and with full faith and credit in violation of the Federal Constitution. This was to the damage and prejudice of petitioners and said student beneficiaries provided for in the Codicil. They in effect had no day in court at all. The attorney fee claim was denied as not germane to the matters involved, and the recoupment and recovery of the estate assets was denied because of the Texas judgment cancelling the Codicil. It is all more fully shown in petitioners' said briefs constituting the record, herein, to which reference is made. When petitioners appealed from these adverse holdings, they emphasized this full faith and credit point in their unopposed motions (Appendix, pp. vi-viii) for oral arguments in said two (2) companion cases before the Supreme Court of the State of Oklahoma; and the arguments were accordingly granted and made. Thereafter, when said Oklahoma Supreme Court rendered its said September 29, 1959 opinions affirming the trial courts, petitioners again emphasized this full faith and credit point in their applications for rehearing (Appendix, pp. xxxiv-xxxv) therein, but to no avail.

The only authorities cited by the Oklahoma Supreme Court which it says support its September 29, 1959 opinions against petitioners' above mentioned contentions, are:

> "49 C.J.S. 'Judgments', pg. 735 and 861, and *Moore* v. *Moore* (Texas), 259 S.W. 322."

However, these Court cited authorities are not in point at all. They do not concern any judgment void on the face of its record, such as is involved herein. They concern

only voidable judgments, which are quite different from void judgments. They do not concern any trustee or executor, or whether they may agree or be bound beyond the scope of their authority or duty, such as is involved herein. They do not concern the bargaining away of protection and benefits of any one under a disability, such as deserving student beneficiaries involved herein.

Petitioners further rely on the authorities of *Pendleton* v. *Hare* (Texas), 231 S.W. 334 on Attorney Fees, and *Murphey* v. *Dalton* (Mo.), 314 S.W.2d 726 on Wills-Trusts.

REASONS FOR GRANTING WRIT OF CERTIORARI

The writ of certiorari prayed for herein, should be granted, and petitioners so pray, because the questions presented above merit the attention of this Supreme Court of the United States; and for the further reasons that the opinions and holdings of the courts sought to be reviewed herein:

1. Violate and oppose the Full Faith and Credit Clause (Art. 4) and the Due Process of Law Amendment (Am. 14) of the Constitution of the United States, to the damage and prejudice of petitioners and the deserving student beneficiaries provided for in the Codicil involved. Constitutional rights should not be violated or ignored.

2. Are in conflict with and oppose all of petitioners' above cited United States Supreme Court cases on the Full Faith and Credit Clause (Art. 4) and the Due Process of Law, Amendment 14 to the Constitution of the

United States. These cited cases should be honored and followed herein.

3. Are in conflict with and oppose all of petitioners' above cited authorities on "Wills", "Trusts", "persons interested in Will contests", "violation of public policy as to Wills and Trusts", "Judgments void on the face of their record", "Jurisdiction to render Judgments", and "attorney fees in estate administrations." These authorities are in point and basic on the questions involved.

4. Wrongfully deprive untold thousands of deserving student beneficiaries all over the United States, from their educational protection and benefits which was so thoughtfully and generously ($10,000,000.00) provided for under the Codicil involved. These students in effect have never had their day in court to defend or uphold their interests so provided. Being unknown, they are under a disability.

5. Set a precedent and example to encourage the breaking of charitable and educational Wills and Trusts. Sanction the conduct of colleges, universities, Attorneys General, executors, trustees, and even churches and courts, to that end. This trend should be stopped now before it spreads. The sanction of such conduct violates basic good morals and law, and should therefore be condemned by this Supreme Court of the United States herein. It is certainly not good teaching for deserving young students. A higher standard should be set

6. Set a precedent and example to discourage people, and particularly wealthy people, from making Wills or Trusts to help out in charity and education. Now, of all times, our colleges and universities, and our deserving young students, need such help. This need of educational financing is a national problem of the highest urgency. The opinions and holdings sought to be reviewed herein will certainly discourage such help from now on. People will lose confidence in the institutions involved, and others like them. Their charitable desires to help in the field of education will be stopped when the need is greatest. They will find other uses for their money. The fear of such a precedent and trend was first voiced by the involved colleges and universities themselves. This shows the national urgency does exist. It was in the form of a letter by the Dean of Baylor University Law School to Rosser J. Coke, dated February 19, 1954, with copies to the Independent Executor First National Bank in Dallas; John W. Porter; the Attorney General of Texas, and the various counsel of the other colleges and universities herein. It expressed fear that improper handling of the Sells estate gift to education might do much to discourage such gifts in the future, if the public got the idea they would make no real fight to preserve the bequest intact. This letter was introduced in evidence as a part of Porter's Exhibit 5 in the March 25, 1958 trial in said District Court Case No. 38271 herein, and is quoted in part in the Appendix at pages xxxvi-xxxvii. It was confined to the unchallenged proposed settlement of the first Texas contest. Peti-

tioners had also advised against this settlement. The later and more flagrant problem and trend of the colleges and universities actually bargaining away the Codicil in the second Texas contest, had not even been conceived when this letter was written. This bargaining away trend will be even more damaging to education. The wealthy will lose faith in giving when they find out what such colleges and universities are doing in this respect, and what the courts are approving. This Supreme Court of the United States can now stop this trend before it spreads. It can now set the proper precedent and example needed. It can grant certiorari herein for its own thorough opinion on the matters involved, and help clarify the situation.

Respectfully submitted,

JOHN W. PORTER, JR. of
PORTER & PORTER,
630 Equity Building,
Muskogee, Oklahoma,
Counsel for Petitioners.

February, 1960.

APPENDIX

IN THE COUNTY COURT OF MUSKOGEE COUNTY, STATE OF OKLAHOMA

In the Matter of the Estate of Murray Case Sells, deceased. —No. 9069.

Decree of Distribution

On this 16th day of July, 1957, this matter comes on to be heard on the petition of Oklahoma Bacone College Trust, John Brown University, Texas Wesleyan College, University of Texas, Texas A & M College, Southern Methodist University, Texas Christian University, Baylor University, Oklahoma A & M College now Oklahoma State University, and the University of Oklahoma, having been set for hearing on the 1st day of July, 1957, at 10:00 a. m., by order entered herein on June 21, 1957, and on said July 1, 1957, having been continued for hearing to the 5th day of July, 1957, and on said 5th day of July, 1957, having been continued to the 10th day of July, 1957, and on said 10th day of July, 1957, having been continued to this date, and upon the written objections thereto filed this date by John W. Porter, Jr., and Jno. W. Porter also known as John W. Porter, both individually and also as sole partners doing business as the law firm of Porter & Porter. The Court finds that notice of this hearing has been duly given at least five days prior to July 1, 1957, when this matter was originally set for hearing, to The First National Bank & Trust Company of Muskogee, the Administrator with Will Annexed of the Estate of Murray Case Sells, deceased, The First National Bank in Dallas, Texas, named as Trustee in the Codicil to the Last Will and Testament of Murray Case Sells, deceased, probated herein, the General Board of Education of the Methodist Church, Nashville, Tenn., named as contingent devisee and legatee in said Codicil,

the Attorney General of the State of Oklahoma, the Attorney General of the State of Arkansas and the Attorney General of the State of Texas, each as overseer of charitable trusts for the benefit of the citizens of their respective states, in the manner and form directed by said Order of June 21, 1957. The petitioners appear by their attorney, Julian B. Fite, The First National Bank & Trust Co. of Muskogee, appears by its Trust Officer, J. W. Hockman, The First National Bank in Dallas, Texas, the General Board of Education of the Methodist Church, the Attorney General of the State of Oklahoma, the Attorney General of the State of Arkansas and the Attorney General of the State of Texas each file herein a disclaimer, requesting that the Court proceed in response to the petition of the residuary legatees and devisees to make distribution under the Last Will and Testament of Murray Case Sells, deceased, exclusive of the Codicil to such Will. The objectors appear by John W. Porter, Jr., as set out in their objections filed. All appearing parties announce ready to proceed. Thereupon evidence is adduced. The Court, having heard the evidence and being duly advised in the premises, finds as follows:

At the time of his death Murray Case Sells was a resident of the State of Texas, his domiciliary estate has been probated in the Probate Court of Gregg County, Texas, and amounts to several millions of dollars. The estate probated in the State of Oklahoma, forms only a small proportion of the total estate. In the domiciliary proceedings in the State of Texas, the Court has found the codicil to the Last Will and Testament of Murray Case Sells, deceased, to be invalid and has directed distribution pursuant to the Last Will and Testament of Murray Case Sells, deceased, exclusive of such Codicil. The court finds that the trust provided by the Codicil to the Last Will and Testament of Murray Case Sells, has been, by action of the Texas Court rendered nugatory; that such trust envisages a large amount of property and money being placed

therein, and is unworkable, unless the amount be in a very large sum, and that by virtue of its action the Texas court has made it impossible for the named trustee, The First National Bank in Dallas, Texas, to act as Trustee. The Court finds that it is improper and not in accordance with the principles of equity that one small portion of the estate should be administered under a trust set up for a much larger property, when as to the principal estate such trust has been declared invalid.

The Court further finds that the persons before this Court, other than The First National Bank & Trust Company of Muskogee, are all of the persons directly or contingently interested in the residue of the estate for distribution, and that all of such persons, excepting the objectors above named have requested this Court to distribute the residue of the estate herein pursuant to the Last Will and Testament of Murray Case Sells, deceased, probated in this cause, exclusive of the Codicil thereto, also probated in this cause. The petitioners herein are all of the residuary legatees and devisees under the Last Will and Testament of Murray Case Sells, deceased, and are the same persons who are the beneficiaries of the trust established by the Codicil, and in the same proportion. The Court finds that the ends of justice will be best served by making distribution under the Last Will and Testament of Murray Case Sells, deceased, exclusive of the Codicil thereto.

The Court further finds that the petitioners herein are the only persons entitled to share in such distribution and have at all times been represented by Julian B. Fite, and that said petitioners have requested that the Court do make allowance to Julian B. Fite for his fees in this cause before ordering distribution to them. The Court finds that $3,657.5[illegible] is a just and reasonable fee to be paid to Julian B. Fite, from which sum he has agreed to pay such costs as may have been incurred herein since the approval of the final account and the supplemental final account of The First National Bank & Trust Company of Muskogee, Adminis-

trator with Will Annexed. Therefore, of the sum shown by the Order approving said accounts to be on hand, to-wit, $81,657.58, which constitutes the entire residue of the estate subject to the jurisdiction of this court, the amount of $3,657.58 should be paid to Julian B. Fite, from which sum he assumes and agrees to pay any remaining costs in this cause. The remaining sum of $78,000.00 should be distributed as follows:

To Oklahoma Bacone College Trust	5% or	$ 3,900.00
To John Brown University	20% or	$15,600.00
To Texas Wesleyan College	20% or	$15,600.00
To University of Texas	5% or	$ 3,900.00
To Texas A & M College	10% or	$ 7,800.00
To Southern Methodist University	10% or	$ 7,800.00
To Texas Christian University	5% or	$ 3,900.00
To Baylor University	5% or	$ 3,900.00
To Oklahoma A & M College, now Oklahoma State University	10% or	$ 7,800.00
To The University of Oklahoma	10% or	$ 7,800.00

such respective sums to be administered and used by said institutions in accordance with the directions contained in the Last Will and Testament of Murray Case Sells, deceased, probated herein.

It Is, Therefore, Ordered and Decreed that The First National Bank & Trust Company of Muskogee, Administrator with Will Annexed of the Estate of Murray Case Sells, deceased, do proceed to distribute the balance on hand of $81,657.58, constituting the entire estate, subject to the jurisdiction of this court, remaining for distribution, by paying therefrom the fees to Julian B. Fite, above set forth, and distributing to the various institutions which are the residuary legatees and devisees the remainder of the fund on hand in the percentages and amounts above set forth

It Is Further Ordered that upon the completion of such payments and distributions that The First National Bank & Trust Company of Muskogee, Administrator with Will Annexed, be discharged from any further duties and responsibilities with reference to this matter.

To all of which findings and orders contrary to the matters and things set out in their objections the objectors, above named, except.

(S E A L)

J. F. Beavers,
Judge of the County Court of
Muskogee County, Oklahoma.

IN THE DISTRICT COURT WITHIN AND FOR MUSKOGEE COUNTY, STATE OF OKLAHOMA

In the Matter of the Estate of Murray Case Sells, deceased.—No. 36527.

DECREE.

On this 20th day of August, 1957, this matter comes on to be heard on the appeal of John W. Porter, Jr., and Jno. W. Porter, also known as John W. Porter, individually and as sole partners doing business as the law firm of Porter & Porter, from the decree of the County Court of Muskogee County, State of Oklahoma, entered in this cause, pending in said court, as "In the Matter of the Estate of Murray Case Sells, deceased," No. 9069, on the 16th day of July, 1957. The appellants appear by their counsel, John W. Porter, Jr., and the appellees, Oklahoma Bacone College Trust, John Brown University, Texas Wesleyan College, The University of Texas, Texas A & M College, Southern Methodist University, Texas Christian University, Baylor University, Oklahoma A & M College, now Oklahoma State University, and The University of Oklahoma, appear by their counsel, Julian B. Fite. All parties announce ready to proceed.

Thereupon evidence is adduced and the matter is argued to the Court. The Court having heard the evidence and the argument of counsel, and being duly advised, finds that the Decree of Distribution entered by the County Court of Muskogee County, Oklahoma, in "The Matter of the Estate of Murray Case Sells, deceased", No. 9069 in said court, on the 16th day of July, 1957, should be in all things affirmed.

It Is Therefore Ordered, Adjudged and Decreed that the Decree of Distribution entered in the County Court of Muskogee County, State of Oklahoma, in "The Matter of the Estate of Murray Case Sells, deceased," No. 9069 in said court, on the 16th day of July, 1957, be and it is hereby affirmed, to which action of the Court the appellants except.

/s/ E. A. Summers, Judge.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

John W. Porter, Jr., et al,	)	
Plaintiffs in error,	)	No. 37996
vs.	)	and
Oklahoma Bacone College Trust, et al.,	)	No. 38271
Defendants in error.	)	

MOTION FOR ORAL ARGUMENT

Come now the plaintiffs in error herein as litigants and acting as their own counsel and attorneys, and without waiving any of their points of their appeals herein they move and pray that they be granted oral argument on the main merits of their above numbered appeals herein, and that these cases be set for such oral argument herein, in addition to the written briefs of the parties herein, for the primary reasons and necessity as follows: ----------

We have thus far lost all of our contentions in every capacity, and the opposition has thus far prevailed in everything they sought. The Oklahoma trial courts herein have

held in effect that said Texas court cancellation of the Codicil is *res judicata* in the Oklahoma litigation, and has the effect of cancelling the incontestable Codicil probated in Oklahoma; all in spite of the fact that said Texas court cancellation is void on the face of its record for lack of any defense of the Codicil by the Executor, and for lack of necessary parties interested, and for lack of that Texas court's jurisdiction to render the cancellation judgment, all occasioned and forced to be so by said conspiracy:

Livingston v. *Livingston* (Iowa), 152 N.W. 200

Logan v. *Thompson* (Texas), 202 S.W.2d 212

Daniels v. *Jones* (Texas), 224 S.W. 476

Aria v. *Saenz* (Texas), 52 S.W.2d 385

One question seems to be: Should the Oklahoma courts give full faith and credit to an incontestable Oklahoma probate (judgment) of the Codicil, or should they on the contrary give full faith and credit to a conspired void Texas cancellation of the Codicil to the ultimate defeat of the incontestable Oklahoma judgment? Is it not more important here in Oklahoma to rectify a wrong where possible, rather than to strain at hairs in an effort merely to be consistent with the wrong and conspiracy and void judgment originating in Texas?—particularly where we are dealing with a testator's last wish (Codicil) as to just how he wanted his money handled for the large single charitable trust he provided for. There is apparently no real reason why that last wish (Codicil), incontestable in Oklahoma, cannot be fully and safely and completely carried out under Oklahoma jurisdiction. All who wrongfully have the estate, or who may be primarily concerned, have come into and invoked that jurisdiction. All that is needed is an Oklahoma judgment herein recouping all the estate assets and appointing an Oklahoma banking principal trustee to take the place of the Dallas Bank trustee.—This case not only

[APPENDIX]

concerns ten (10) of the largest and best known Colleges and Universities in Oklahoma, Texas and one in Arkansas, and the Executor (First National Bank in Dallas, Texas), which is one of the largest and most influential banking and trust firms in the South, and the Attorneys General of Oklahoma, Texas and Arkansas, all parties to the present case,; but it also concerns and affects untold numbers of the citizens (deserving young men and women) of those States and of other States in the United States who may some day wish and need financial assistance under the Codicil trust in an effort to attend school at any one or more of the ten (10) Colleges and Universities involved, and who have not had their unhampered day in court in said Texas cancellation of the very instrument made for their benefit and protection. And this case at bar might very well deserve the ultimate attention of the Supreme Court of the United States—even more deserving than:

Hanson v. *Denckla*, 78 S.Ct. —, 2 L.ed.2nd 1283

It may also very well be a case of first impression on one or more points. - - -

[APPENDIX]

FILED
IN SUPREME COURT
OF OKLAHOMA
SEP 29 1959
ANDY PAYNE
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

John W. Porter, Jr., and Jno. W. Porter, also known as John W. Porter, both individually and also as sole partners dba the law firm of Porter & Porter,

Plaintiffs in Error,

vs.

The Oklahoma Bacone College Trust, John Brown University, Texas Wesleyan College, University of Texas, Texas A & M College, Southern Methodist University, Oklahoma A & M College, now Oklahoma State University, University of Oklahoma, Texas Christian University, Baylor University, First National Bank in Dallas, as Independent Executor of the Estate (in Texas) of Murray Case Sells, deceased, The First National Bank & Trust Company of Muskogee as Administrator with Will and Codicil annexed of the Estate (in Oklahoma) of Murray Case Sells, deceased, General Board of Education of The Methodist Church of Nashville, Tenn., Bruce Bennett as Attorney General of the State of Arkansas, Mac Q. Williamson as Attorney General of the State of Oklahoma, and Will Wilson as Attorney General of the State of Texas,

Defendants in Error

No. 37,996

SYLLABUS

1. When a party makes an appearance in an action and asks affirmative relief, he thereby

enters a general appearance in said cause and waives the right to thereafter challenge the jurisdiction of his person.

2. A claim against the estate of a decedent can only be established: (1) By being first presented to and allowed by the executor or administrator, and then being presented to and approved by the county judge; or (2) By judgment thereon in an action against the personal representative in the proper court.

3. Record examined and held that plaintiffs in error under record will not in this proceeding, be permitted to attack order of county court of Muskogee County ordering distribution of testator's estate.

APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY, OKLAHOMA,

Honorable E. A. Summers, Judge

APPLICATION TO STAY DISTRIBUTION OF OKLAHOMA PORTION OF TESTATOR'S ESTATE UNTIL SUCH TIME AS UNPAID ATTORNEYS FEES AND PROSPECTIVE TRUSTEE FEES OF PLAINTIFFS IN ERROR UNDER TRUST CREATED BY CODICIL TO A WILL WERE ESTABLISHED. FROM ORDER OF COUNTY COURT OF MUSKOGEE COUNTY DENYING APPLICATION AND ENTERING ORDER DISTRIBUTING ESTATE. PLAINTIFFS IN ERROR APPEALED TO DISTRICT COURT. AND FROM ADVERSE JUDGMENT OF SAID COURT. PLAINTIFFS IN ERROR APPEALED TO THIS COURT.

AFFIRMED

Porter & Porter,
Muskogee, Oklahoma — For Plaintiffs in error

A. Carl Robinson,
Julian B. Fite,
Muskogee, Oklahoma

For Defendants in error:

The Oklahoma Bacone College Trust; John Brown University, Texas Wesleyan College, University of Texas, Texas A & M College, Southern Methodist University, Oklahoma A & M College, now Oklahoma State University, University of Oklahoma, Texas Christian University, Baylor University, and First National Bank in Dallas as Independent Executor of the Estate (in Texas) of Murray Case Sells, deceased.

- - - - - - -

BERRY, J.

As indicated in our opinion in No. 38,271 adopted this date, the facts set forth in that opinion furnish the background for and are applicable to this appeal.

The educational institutions who appear as defendants in error in this case and who were the residuary beneficiaries under the Will of Murray Case Sells, deceased, hereafter referred to as "testator", filed a "Petition for Distribution" in the ancillary proceeding filed in the County Court of Muskogee County, Oklahoma, to probate the Will of testator. In said petition the petitioners asked that the Oklahoma portion of testator's property which had been reduced to cash, be distributed in accordance with the Will. The petition stated that the codicil to the Will under which a frust was created had failed or become inoperative for reasons set forth in our opinion in No. 38,271; that the plaintiffs in error, hereafter referred to as

"the Porters", claimed some interest in testator's Oklahoma estate, but that they in fact had none.

The Porters filed a pleading denominated "Objections" to the above referred-to petition. In said pleading the Porters alleged that they appeared specially and for the purpose of objecting to the Petition for Distribution upon the grounds that notice of hearing said petition had not been given as required by law; that all persons were not before the Court; that they had instituted an action in a Federal District Court in Texas against the defendant in error, the First National Bank in Dallas, Texas, hereafter referred to as "Texas bank" to recover unpaid attorney fees and damages due in connection with the domiciliary probate of testator's Will and codicil thereto in Texas; that the Texas portion of testator's estate had been 80% distributed; that the Porters were entitled to a lien against testator's estate for monies owing them and that the Oklahoma portion of testator's estate should therefore not be distributed; that the Porters had "certain substantial and remunerative duties" to perform at the expense of the trust created under the codicil and would be irreparably damaged if distribution were made as prayed for in the petition.

Following a hearing on the Petition for Distribution in the county court said court ordered distribution of the estate in accordance with the provisions of testator's Will. The Porters appealed to the district court and from an adverse judgment of said court filed a motion for new trial, and from order denying the motion for new trial perfected this appeal.

In view of the fact that for reasons stated in No. 38,271, the judgment of the County Court of Gregg County, Texas, to the effect that testator was without testamentary capacity to make the codicil in controversy, is binding upon the Porters, the Porters' only claim against any portions of testator's estate is their claim for unpaid attorneys' fees

allegedly earned as attorneys for the executor (the Texas Bank) appointed in the domiciliary proceeding in Texas to probate testator's Will and codicil.

Defendants in error frankly concede that notice of hearing on the Petition for Distribution was not given as by statute provided. They assert, however, that the Porters are not in position to urge said matter for the reason that the Porters are without right to proceed as they are attempting to proceed; that the Porters in fact entered their appearance and that all other interested parties in fact entered their appearance. The Porters in turn assert that their appearance was special; that persons who might assert an interest in the estate as heirs were not notified and that they are privileged to proceed as they are attempting to proceed herein.

The Porters, as pointed out, did not limit their appearance to a special appearance and the pointing out of the jurisdictional defect that they complained of. They went further and asked for affirmative relief consisting of a delay in distributing the Oklahoma portion of testator's estate until such time as their claim against testator's estate had been established. By so proceeding the Porters entered their general appearance. In *Eureka Tool Co. v. Collins*, 182 Okla. 552, 78 P.2d 1057, in the second paragraph of the syllabus it was said:

> "2. When a party makes an appearance in an action for any purpose other than to challenge the jurisdiction of the court, he thereby enters a general appearance in said cause and waives the right to thereafter challenge such jurisdiction."

The record fails to show that the Porters filed a claim in the County Court of Muskogee County covering alleged unpaid attorneys' fees earned in representing the domiciliary executor in Texas. The decisions of this Court establish that the claim before us is of a class that under the

applicable statutes, 58 O.S. 1951, Sec. 333, *et seq.*, must be presented to the personal representative of testator's ancillary estate before same can be satisfied out of the assets of the said estate. See *Hyden* v. *Wilkinson*, 187 Okla. 348, 102 P.2d 887. And that the matter of presenting such a claim to a personal representative of the estate is a condition precedent to maintaining an action thereon. See *Treese* v. *Horany et al*, 119 Okla. 64, 248 Pac. 557, and *McLeod et al* v. *Palmer*, 189 Okla. 466, 117 P.2d 770. In the first paragraph of the syllabus to the last-cited case, this was said:

> "1. A claim against the estate of a decedent can only be established: (1) By being first presented to and allowed by the executor or administrator, and then being presented to and approved by the county judge; or (2) by judgment thereon in an action against the personal representative in the proper court."

The Supreme Court of California pointed out in *In re Burdick's Estate*, 44 Pac. 734, that an "order refusing to postpone the decree of final distribution was not appealable" and that trustees who had not presented a claim against the estate would not be permitted to appeal from a decree of the probate court ordering distribution.

Under the cited authorities, the Porters are without right to proceed as they are attempting to proceed herein and for said reason will not be permitted to herein attack the order of distribution that they attempted to appeal from. This does not mean that they are foreclosed from establishing their claim for unpaid attorneys' fees in any proper way now open to them, or of their right to have their claim, when properly established, satisfied out of the assets of the Oklahoma portion of testator's estate.

Affirmed.

FILED
IN SUPREME COURT
OF OKLAHOMA
November 24, 1959
ANDY PAYNE, CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

November 24, 1959

THE CLERK IS HEREBY DIRECTED TO ENTER THE FOLLOWING ORDERS:

* * * * * * *

37996—John W. Porter, Jr., et al v The Okla. Bacone College Trust, et al. Application for leave to file second petition for rehearing denied.

37271—John W. Porter, Jr., et al v The Okla Bacone College Trust, et al. Application for leave to file second petition for rehearing denied.

* * * * * * *

ATTEST:

ANDY PAYNE, CLERK.

Denver N Davison,

Chief Justice

[APPENDIX]

IN THE DISTRICT COURT OF MUSKOGEE COUNTY, OKLAHOMA

Oklahoma Bacone College Trust, et al, Plaintiffs,

vs. No. 36586

John W. Porter, Jr., et al, Defendants.

ORDER

On this day there came on regularly for hearing the motion to dismiss and demurrer of the defendant First National Bank in Dallas to the cross action against it for attorney fees by the defendants John W. Porter, Jr. and Jno. W. Porter also known as John W. Porter both individually and as sole partners doing business as the law firm of Porter & Porter, said Porters appearing in their own behalf, and said Dallas Bank appearing by its attorneys Fite & Robinson, and announced ready. And the Court after a full consideration thereof and being well and sufficiently advised finds that said motion and demurrer should be sustained on the pleadings.

It is therefore ordered and adjudged that said motion and demurrer be and the same are hereby sustained on the pleadings and that said cross action against said Dallas Bank for attorney fees be and the same is hereby dismissed, to all of which findings and rulings said Porters and each of them except

Dated and done in open Court this March 24, 1958.

s Clarence Mills
(Hon. Clarence Mills) JUDGE

Approved as to form:

s John W. Porter, Jr.
John W. Porter, Jr. for said Porters

s by A. Carl Robinson
Fite & Robinson, Attys for said Dallas Bank

IN THE DISTRICT COURT OF MUSKOGEE COUNTY, OKLAHOMA

Oklahoma Bacone College Trust, et al,
Plaintiffs.

vs.

John W. Porter, Jr., et al,
Defendants.

No. 36586

ORDER

On this day this matter comes on to be heard before the specially assigned trial judge herein, Hon. Clarence Mills, on the motions to dismiss for want of jurisdiction filed herein by the defendants Will Wilson Attorney General of The State of Texas, Bruce Bennett Attorney General of The State of Arkansas, and Mac Q. Williamson Attorney General of The State of Oklahoma, to the various cross-actions filed herein against them by the defendants Porter & Porter, all parties appearing by counsel. And the Court after a full consideration thereof and being well and sufficiently advised concerning said matters finds that said motions should be sustained.

It is therefore ordered and adjudged that said motions be and the same are hereby sustained and said cross-actions dismissed as to said movants and each of them, to which holdings and rulings the defendants Porter & Porter and each of them except.

Dated and done in open Court this 24th day of March, 1958.

s/ Clarence Mills, Judge

Approved as to form March 24, 1958:

s/ E. G. Carroll, original Judge

s/ Julian B. Fite,
attorney for the 3 Attorneys General.

s/ John W. Porter, Jr.
attorney for the defendants Porter & Porter.

[APPENDIX]

IN THE DISTRICT COURT OF MUSKOGEE COUNTY,
STATE OF OKLAHOMA

Oklahoma Bacone College Trust, et al,)
Plaintiffs,)
vs.) No. 38271
John W. Porter, Jr., et al,)
Defendants.)

JUDGMENT OF THE COURT
(transcript) (March 25, 1958)

An agreement was made, in open court, in the County Court of Gregg County, Texas, in which all interested parties were present or by counsel, which with certain evidence, resulted in a final decree in that court. This agreement and decree was acquiesced in and approved by Mr. Porter, who was present, and with his co-counsel Mr. Coke. Mr. Coke, with Mr. Porter's approval, OK'd the journal entry of this decree. That was his agreement fairly arrived at by all parties, and it is binding on the Porters, and nothing can be done about that. The evidence does show that he was paid a fee, which fact is probably immaterial to this lawsuit, except it does show that he was paid some fee.

Therefore the decree of the Texas Probate Court holding the codicil invalid, insofar as this Court is concerned is a valid judgment. Furthermore, as to the Porters, it was made under an agreement, which, in the light of the evidence, was desirable and proper, and fairly made in open court.

After considering the evidence, I think I can appreciate the position Mr. Porter was in, and I can appreciate the position these schools were in, and I can appreciate the reasons the several Texas lawyers agreed to the settlements and to the decrees that were made in the Texas court. I find

that there was no fraud or overreaching in arriving at the agreements and decree which eliminated entirely the codicil to the will of Mr. Sells.

Mr. Porter was a witness both to the will and codicil, and he approved the action of the Texas court. I find that he did nothing improper in these matters. The facts as I view them, as they existed at the time of the Texas decree, had him in a dilemma—a bad spot—as were all the schools and other beneficiaries under the will. A choice, of necessity, had to be made. It was made for good reasons.

Therefore, there is no codicil, which leaves the original will just as it was originally written. Therefore there is no testamentary trustee. Therefore there is no basis, here, for the Porters' claims, since Mr. Porter was mentioned only in the codicil. Therefore the plaintiffs schools take the money under the provisions of the will.

Draw your journal entry please. Judgment for the plaintiffs. Exceptions.

Clarence M. Mills, specially assigned Judge

[APPENDIX]

FILED
IN SUPREME COURT
OF OKLAHOMA
SEP 29 1959
ANDY PAYNE
CLERK

John W. Porter, Jr., and Jno. W. Porter, also known as John W. Porter, both individually and also as sole partners dba the law firm of Porter & Porter,

Plaintiffs in error,

vs.

Oklahoma Bacone College Trust, John Brown University, Texas Christian University, Texas Wesleyan College, University of Texas, Texas A & M College, Southern Methodist University, Baylor University, Oklahoma State University, University of Oklahoma, The General Board of Education of the Methodist Church, a corporation, First National Bank in Dallas, Texas, The First National Bank & Trust Co. of Muskogee, Oklahoma, Bruce Bennett, Attorney General of the State of Arkansas, Will Wilson, Attorney General of the State of Texas, and Mac Q. Williamson, Attorney General of the State of Oklahoma,

Defendants in error.

No. 38,271

SYLLABUS

1. Judgment of a county court of Texas holding testator without testamentary capacity to make codicil is not subject to collateral attack on grounds that adverse parties fraudulently conspired and connived in obtaining judgment, when complaining parties had knowledge of

alleged fraudulent conspiring and conniving at time judgment was rendered.

2. Final judgment of county court of Texas holding testator without testamentary capacity to make codicil is binding upon courts of this state notwithstanding time within which to contest codicil admitted to probate in ancillary proceedings in county court of this state had expired prior to Texas judgment being rendered.

3. A cause of action set up in a cross-bill must be germane to the original controversy; and where a defendant seeks to set up new and distinct matter, not maintainable under the provisions of the Code as a counter claim, unless such matter is involved in a proper determination of the subject-matter of the original suit, a defendant will be required to litigate it in a separate action.

APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY, OKLAHOMA,

Hon. Clarence Mills, Assigned Judge, Presiding.

ACTION TO DECLARE CODICIL TO FOREIGN WILL, WHICH WILL AND CODICIL HAD BEEN ADMITTED TO PROBATE IN A LOCAL ANCILLARY PROBATE PROCEEDING, TO BE WITHOUT EFFECT IN VIEW OF JUDGMENT IN DOMICILIARY PROCEEDING TO ADMIT WILL AND CODICIL TO PROBATE THAT CODICIL WAS VOID BECAUSE OF LACK OF TESTAMENTARY CAPACITY ON TESTATOR'S PART AT TIME CODICIL WAS MADE AND IN ALTERNATIVE TO DECLARE TRUST SET UP IN CODICIL TO BE INOPERATIVE BECAUSE OF MATERIAL CHANGE OF

[APPENDIX]

CONDITIONS BROUGHT ABOUT BY TRUST BEING VOIDED BY JUDGMENT IN DOMICILIARY PROCEEDING. DEFENDANTS, JNO. W. PORTER AND JOHN W. PORTER, JR., BY ANSWER AND BY CROSS PETITIONS AND CROSS-BILLS SOUGHT TO ESTABLISH VALIDITY OF CODICIL; RESTITUTION OF MONIES EXPENDED IN SETTLING WILL CONTESTS IN TEXAS; RESTITUTION OF MONIES DISTRIBUTED TO BENEFICIARIES UNDER ORDER OF COUNTY COURT OF TEXAS; ACTUAL AND EXEMPLARY DAMAGES FOR BEING DEPRIVED OF ANTICIPATED TRUSTEE FEES UNDER THE TRUST PROVIDED FOR IN CODICIL AND ADDITIONAL FEES EARNED AS ATTORNEYS FOR TEXAS EXECUTOR. FROM JUDGMENT FOR PLAINTIFFS AND THOSE AGAINST WHOM CROSS PETITIONS AND CROSS-BILLS WERE FILED, DEFENDANTS, JNO. W. PORTER AND JOHN W. PORTER, JR., APPEAL.

AFFIRMED

Porter & Porter
Muskogee, Oklahoma
A. Carl Robinson,
Julian B. Fite,
Muskogee, Oklahoma — For Plaintiffs in Error

For Defendants in Error: Oklahoma Bacone College Trust, John Brown University, Texas Christian University, Texas Wesleyan College, University of Texas, Texas A & M College, Southern Methodist University, Baylor University, Oklahoma State University, University of Oklahoma and First National Bank in Dallas, Texas, as Independent Executor

Will Wilson, Pro se,
C. K. Richards, Ass't.
Attorney General of Texas

For Will Wilson, Attorney General of Texas

- - - - - - - -

BERRY, J.

Murray Case Sells, hereafter referred to as "testator" died testate in 1953. At the time of his death testator's domicile was Gregg County, Texas.

In his last Will testator named the First National Bank of Dallas, Texas, hereafter referred to as "Texas bank", as his "independent executor." The Texas bank was directed to convert all of testator's property into cash. In said Will which was dated November 22, 1950, testator made cash bequests in varying amounts to a number of persons and corporations. No controversy exists concerning these bequests. In paragraph numbered "XXI" of his Will, testator bequeathed the residue of his estate to defendants in error, Oklahoma Bacone College Trust, John Brown University, Texas Wesleyan College, University of Texas, Texas A & M College, Southern Methodist University, Texas Christian University; Baylor University, Oklahoma A & M College and University of Oklahoma.

Five of the above named beneficiaries were directed to use thirty percent of their bequests in making permanent improvements upon their campuses. A suitable and permanent plaque bearing testator's name was to be placed upon said improvements. All of the residuary beneficiaries were directed to use that portion of their bequests which was not used for permanent improvements in establishing a fund to be known as the "Murray Case Sells Foundation", which fund was to be used in making loans to "deserving and needy" students.

By codicil dated May 24, 1951, testator undertook to revoke paragraph XXI of his will and to substitute there-

for the provisions of the codicil. The provisions of the codicil did not serve to change the beneficiaries taking the residue of testator's estate under testator's Will or their share therein or the purpose for which same was to be expended. The codicil did, however, provide for a trust and imposed additional restrictions on the use of the residuary estate. The Texas bank was named as trustee and plaintiffs in error, hereafter on occasions referred to as "the Porters", contend that under the following quoted provisions of the codicil they were in fact given the status co-trustees of the trust and were given a pecuniary interest in the trust and in testator's estate:

"'Paragraph 6. Statements reflecting the administration of the "Building Account" and the "Murray Case-Sells Foundation" shall be rendered annually to the university or college for which such accounts are set up, and at the same time two copies of each thereof shall be furnished to Jno. W. Porter or his successors to his duties as hereinafter provided * * *

"'Paragraph 29. It is my will and I hereby direct that Jno. W. Porter, an attorney of Muskogee, Oklahoma, and successors to his duties as herein provided for, shall be appointed, engaged and retained by my executor as his attorney as such executor and for my estate in the probation of my will and said estate, and shall be appointed, engaged and retained by my trustee upon distribution of my said estate to such trustee, as attorney in all matters in the administration of my trust estate. Each such successor is to be a reputable attorney at law and is to be appointed by his predecessor in writing. Such attorney as herein provided for shall be paid his expenses and reasonable compensation by my executor and estate for his services in the probation of my will and estate, and shall be paid his expenses and reasonable compensation by the trustee of my trust estate for his services in the administration

of such trust estate. Such attorney shall make periodical and other reasonable investigations of said educational institutions as to strict compliance with their duties imposed and reasonably contemplated by the applicable terms and provisions of this codicil, and to report any and all violations thereof to the trustee * * *."

The above quoted provisions form the basis of the Porters' asserted right to all relief sought herein except the $200,000.00 additional attorneys fee for which they, by cross-bill, seek judgment against the Texas bank.

The Will and codicil were offered for probate in the County Court of Gregg County, Texas, and the Texas bank was appointed independent executor of the estate. In the matter of probating the estate in Texas, Jno. W. Porter, one of the plaintiffs in error, was employed by said bank to assist a Texas attorney and it is for services rendered in said capacity that the Porters herein seek judgment against the Texas bank for $200,000.00 as additional attorney fees.

After the Will and codicil were offered for probate in Texas, ancillary proceedings to probate the Will and codicil were instituted in the County Court of Muskogee County, Oklahoma. No contest to the admission of the Will and Codicil to probate in Oklahoma was filed. In this proceeding the First National Bank and Trust Company of Muskogee, hereafter referred to as "Oklahoma bank", was appointed as administrator with Will annexed of the Oklahoma portion of testator's estate, which estate was of the aggregate value of approximately $90,000.00. The aggregate value of the Texas portion of testator's estate exceeded $9,000,000.00. As reflected by our opinion in No. 37,996, a decree of distribution was made in the Oklahoma probate proceeding, the validity of which decree is attacked by the Porters in said No. 37,996

[APPENDIX]

Following the offering of testator's Will and codicil for probate in Texas, two different persons attacked the validity of the Will and codicil, and asserted rights to the estate as heirs of testator. A settlement was reached in each of said contests. In connection with one of the settlements, the court in which the Will and codicil were being probated found that testator was without mental capacity to make the codicil and same was therefore found to be without force and effect. This judgment became final. This is the judgment that the Porters contend was obtained through conspiring and conniving on the pait of some of the defendants in error.

In 1957, and after the ancillary probate proceeding had been instituted in the County Court of Muskogee County, Oklahoma, the ten educational institutions named as residuary beneficiaries under testator's Will and codicil thereto, instituted this action. The Porters and all of the defendants in error who are not educational institutions were named as parties defendant. In their petition the educational institutions alleged in substance that in the domiciliary probate proceeding in Texas it was found that testator's codicil was invalid, same having been executed at a time when testator was without mental capacity to make a will; that due to lapse of time testator's codicil was not contestable in the ancillary probate proceeding in Oklahoma; that the codicil set up a trust to be administered by the Texas bank; that "there exists the anomolous situation that a small estate only can be administered under a testamentary provision, anticipating a very large estate and cannot be administered by the trustee named therein nor in the place therein named"; that the "interests of all parties can be best subserved by decreeing distribution under the Last Will and Testament" of testator.

The Porters filed an answer and counter-claim to the petition of the educational institutions. In said answer and

counter-claim the Porters stated in substance that on February 13, 1953 Jno. W. Porter notified the Texas bank that as provided in paragraph numbered 29 of the codicil John W. Porter, Jr. had been designated as his successor; that the educational institutions "and each of them received copies of said Will and Codicil and knew the contents thereof a short time after the originals thereof were admitted to probate March 10, 1953, but plaintiffs and each of them brought about and caused the very anomalous situation of which they are now complaining, through their own wrongful acts and conduct as joint tortfeasors forming the basis of the action alleged in their said Petition, resulting directly in great and irreparable damage to said Porters, all as follows, to-wit: That on or about March 1, 1956 Gertrude Parker and Edward Milliken, two heir beneficiaries of the said Murray Case Sells, deceased, filed a court action in Case No. 5815 in the County Court of Gregg County, Texas against said Executor, contesting the Will and Codicil and the probate thereof in Texas, and they thereafter offered to settle said contest and have it dismissed with prejudice for the sum of $750,000.00. However, said plaintiffs (educational institutions), apparently wanting the bulk of said estate pursuant to the Will without the investigation and supervision provided for in the Codicil, and seeing an opportunity in said contest to accomplish such, they conspired and connived with said contestants on the one hand and said Executor on the other hand to the effect that they (said plaintiffs) would approve said $750,000.00 being paid said contestants out of the estate assets if the contestants would go through with the contest only as to the Codicil and introduce evidence at the contest trial attacking only the Codicil, and with the further understanding and assurance that neither said Executor nor any of them (said plaintiffs) would challenge such evidence or offer any contradictory evidence or make any defense of said Codicil, all in spite of the Executor's

duty under law to uphold and defend the Codicil and in willful and wanton disregard of said Porters' rights and duties under the Codicil, all of which was done and accomplished at said trial in said contest case in Texas on or about June 22, 1956 resulting in a final court decree then and there adjudging said Codicil invalid. That said plaintiffs (educational institutions) participated in and were represented in that litigation and trial. That during all said conspiring and conniving and up to and including said contest trial, said Executor had available and or in its possession sufficient evidence to refute and overcome all the evidence produced by the contestants at said trial, and plaintiffs (educational institutions) and said Executor had knowledge thereof, but they all refused to make use thereof. That while said Jno. W. Porter was required to be and appear in said trial as one of the attorneys for said Executor along with its regular Bank attorney, he was there only in that capacity and to voice only the wishes and views of his client (Executor) and in no other capacity, he having already personally disapproved of such to his said client, and it would have violated legal ethics to have represented conflicting interests.

"6. That if said Codicil had not been so decreed invalid in Texas said Porters would have easily netted at least $300,000.00 under and during the reasonable life of the trust therein created, mainly in regular investigative duties as per said paragraphs numbered 6 and 29 of said Codicil, and they would have done so but for the aforesaid conspiracy and wrongful acts and conduct of plaintiffs in bringing about the termination shown."

In the referred-to answer and counter-claim, the Porters plead further that the educational institutions and Texas bank were "estopped from obtaining anything or any relief for themselves" or for others; that the Porters were entitled to a lien against the assets of the estate for

any money judgment that they might recover; that if the Codicil had been decreed valid in Texas the Porters would "have easily netted $300,000.00" in fees, and prayed for judgment in said amount against the educational institutions.

The Attorney Generals of the States of Oklahoma, Texas and Arkansas filed disclaimers as did the Texas bank.

The plaintiffs in error filed a cross-claim against each of the Attorney Generals. Therein the Porters repeated the charge set forth in their counter-claim heretofore referred to and plead that "the plaintiffs and said three named attorney general defendants and said defendant First National Bank in Dallas, Texas, by their present pleadings and concerted actions herein are now seeking to have said Codicil in Oklahoma decreed of no force and effect based on said cancellation thereof in Texas, and with full notice and knowledge of both said contest settlements in Texas, and the are not only estopped therefrom of their own wrongfu. acts but they are jointly and severally liable therefor to the trust estate created under the Codicil trust * * *" and that "The alleged actions and conduct of the attorney generals mentioned were and are wholly outside the scope of their respective authorities as public officials, and thus *ultra vires* in nature, as on the contrary it was and is their public duty to defend and uphold charitable trusts such as the one provided for in said codicil, and they did use and are using knowingly and willfully and without authority or sanction of law the prestige and influence of their respective public offices to accomplish and help accomplish the wrongful acts complained of to the detriment and destruction of the codicil trust and trust estate in Texas and so far in an attempted like detriment and destruction of the codicil trust and trust estate in Oklahoma, all with the apparent concerted wish and

effort and action to that end on the part of the plaintiffs and said defendant Bank executor." The Porters prayed judgment against the several Attorney Generals and the Texas bank for $2,000,000.00 paid out in settling the will contests and for $6,000,000.00 resulting from the alleged unjust destruction of testator's estate under judgment of the County Court of Texas.

The Porters also filed a "Reply and Cross Claim" against the Texas bank wherein they sought judgment against said bank for $200,000.00 as attorneys fee for legal services rendered in the domiciliary probate proceedings, $300,000.00 reasonably-expected trustee fee and an additional amount of $300,000.00 as and for exemplary damages for "wrongful and wanton codicil cancellation" in Texas.

The trial court sustained the motions of the several Attorney Generals to dismiss the cross actions against them and same were dismissed and also sustained the motion to dismiss and demurrer of the Texas bank to the cross action filed against it. The case proceeded to trial against the remaining defendants. Following said trial the issues were found generally in favor of the plaintiffs. The trial court found further that the testator's codicil is without effect; that no trustee should be named to administer the trust alleged to have arisen because of the admission of said codicil to probate in Oklahoma, and that distribution of the estate should be made as set forth in the order of distribution which is directly involved in No. 37,996.

The Porters filed a motion for new trial and from order denying said motion this appeal was perfected on the original record.

The record discloses that Jno. W. Porter participated as an attorney for the Texas bank in the proceeding in the Texas county court that resulted in the codicil in controversy being struck down because of lack of testamentary capacity on the part of testator at time same was executed

Before judgment was entered in said proceeding the court asked Jno. W. Porter this question:

> "Mr. Porter, do you individually and in your representative capacity, do you recommend this settlement and do you agree to be bound thereby and waive the right to appeal?"

To said question Jno. W. Porter answered as follows:

> "In view of all of the facts and circumstances and the evidence introduced, I do."

The Porters here assert that in appearing in said proceeding and in making the answer that Jno. W. Porter made to the court's inquiry, Jno. W. Porter was appearing and answering as attorney for the Texas bank and not as an alleged co-trustee under the codicil: that knowledge gained in the capacity of attorney for the Texas bank is not imputable to him in his capacity as an alleged co-trustee and his answer to the court's inquiry as attorney for said bank is not binding upon him in his capacity of an alleged co-trustee. We are unable to agree.

A Judgment is not subject to collateral attack on the grounds that it was obtained through "conspiring and conniving", or for that matter through fraud where the party complaining had knowledge of the alleged conspiring and conniving or fraud at the time the judgment was rendered. 49 C.J.S. "Judgments", pp. 735 and 861: *Moore* v. *Moore*, (Tex.) 259 SW 322.

In view of the fact that the complained-of judgment of the County Court of Gregg County, Texas, is not subject to collateral attack, claims for damages and other relief asked by the Porters which are based upon the proposition that said judgment is void must fail. The Porters have, therefore failed to establish their claim to prospective trustee or attorneys fees which they allege would have been earned under the trust provisions of the

codicil, and have also failed to establish that amounts distributed in distributing testator's estate should be restored to the trust which was in effect declared inoperative by the County Court of Gregg County, Texas. It follows that the trial court only erred if the Porters are in fact entitled to maintain their cross-bill against the Texas bank for additional fees earned as attorneys for said bank in its capacity as executor of testator's estate in Texas.

The fact that the codicil was not timely contested in the County Court of Muskogee County, Oklahoma, is, in our opinion, under the facts of this case, without significance. In *Patterson et al* v. *Dickinson*, (10th Cir.) 193 Fed. 328, 333, a will was admitted to probate in Missouri, the state of testator's domicile. An ancillary proceeding to probate the will was subsequently instituted in California. A contest to the Missouri probate was thereafter sustained. In pointing out that the Missouri probate court of testator's domicile had exclusive jurisdiction to determine the validity of the will and that said court's judgment on said matter was binding upon the California probate court in which the ancillary probate proceeding had been instituted, the court had this to say:

> "(2). The superior court of Los Angeles county was not vested with jurisdiction primarily to decide whether the instrument which had been admitted to probate in Missouri as the will of Rachael E. Dickinson was what it purported to be. The determination of that question belonged exclusively to the probate court of the decedent's domicile. That court having finally adjudicated the question, and having decreed that the instrument was not the last will and testament of the decedent, and that she died intestate, its judgment must be held to be final and conclusive upon any ancillary administration. * * *"

See also *In Re Randall's Estate* (Cal.) 113 P.2d 54, 56, and compare *Lanyon* v. *O'Neal*, Okla., 329 P.2d 850.

In their petition the plaintiff educational institutions only sought judgment declaring the codicil to be without force and effect and that no trustee should be named under the codicil. In its answer and disclaimer the Texas bank admitted that it was named as trustee in the codicil; that the County Court of Gregg County, Texas rendered a judgment declaring the codicil invalid and void; that the Texas portion of testator's estate had been distributed in accordance with testator's Will; that it "is without any right, title or interest in the Estate of Murray Case Sells now being administered in the County Court of Muskogee County, Oklahoma, and said bank, as Defendant, disclaims any right to be appointed as Trustee pursuant to the said codicil to the Will of Murray Case Sells, deceased, with respect to such estate in Oklahoma."

We are of the opinion that the Porter's cause of action for additional attorneys fees is not germane to the cause of action set forth in the petition, and for said reason the Porters' cause of action cannot be maintained as a cross-bill against the Texas bank in this action. In the third paragraph of the Syllabus to *Baxley, et al* v. *Timms*, Okla., 316 P.2d 871, we said:

> "3. A cause of action set up in a cross-bill must be germane to the original controversy; and where a defendant seeks to set up new and distinct matter, not maintainable under the provisions of the Code as a counter claim, unless such matter is involved in a proper determination of the subject matter of the original suit, a defendant will be required to litigate it in a separate action."

The trial court did not err in dismissing the Porters' cross-bill for additional attorneys fees against the Texas bank.

The judgment of the trial court with the exception of that portion thereof ordering distribution of the estate as directed by the County Court of Muskogee County is affirmed. The County Court's order of distribution was not directly before the District Court in this proceeding, which statement is not true of the appeal in No. 37,996, and the order of distribution not being directly before the District Court on appeal, said District Court did not have jurisdiction to in effect affirm the order of distribution of the County Court.

In view of our opinion herein, it is unnecessary to consider other contentions of the Porters and the defendants in error.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

John W. Porter, Jr., et al.,	)	
Plaintiffs in error,	)	No. 37996
vs.	)	and
Oklahoma Bacone College Trust, et al.,	)	No. 38271
Defendants in error.	)	

Application for Rehearing

"* * * If the Court is going to grant to said defendants in error and impose against us herein, full faith and credit of this absolutely void Texas judgment cancelling the Codicil, and is going to hold that it is binding or *res judicata* as to Jno. W. Porter in his trust capacity or as to either of us in any capacity herein, then our United States Constitutional rights to have only valid judgments receive such full faith and credit will be breached herein. We sincerely hope that will not happen. * * *"

Second Application for Rehearing

"* * * This Court should certainly not allow such action to stand. This Court should certainly not give full

faith and credit to such actions. When brought to its attention, this Court should do all possible to right such wrongs, particularly where persons not parties thereto might otherwise be deprived of some right or property. In our appeals, the 'deserving young men and women' beneficiaries of the Codicil were not parties to said void agreement, and were not in court. The void agreement sought to destroy the very instrument (Codicil) that was for their primary benefit and protection—the supervising Codicil trust. The Codicil was to make sure they received their benefits. * * *"

FILED
IN SUPREME COURT
OF OKLAHOMA
DEC 7 - 1959
ANDY PAYNE
CLERK

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

John W. Porter, Jr., et al.,)
Plaintiffs in Error,) No. 37,996
vs.) and
Oklahoma Bacone College Trust, et al.,) No. 38,271
Defendants in Error.)

ORDER STAYING THE ENFORCEMENT OF MANDATE

On this 7th day of December, 1959, for good cause shown, the application of the plaintiffs in error to stay the enforcement of the mandate heretofore issued is hereby granted and the enforcement of the mandate is stayed until the 15th day of March, 1960, pending the filing of a petition for writ of certiorari by the plaintiffs in error in the Supreme Court of the United States, and if said petition is filed on or before said March 15, 1960, enforcement of the mandate shall be further stayed until such time as the

Supreme Court of the United States renders a final decision herein, or until further order of this Court.

It is further ordered that the nature of the judgment herein is such as not to require the filing of a supersedeas or stay bond on the part of the plaintiffs in error.

Done by order of the Court in Conference this 7th day of December, 1959.

/s/ Denver N. Davison
Chief Justice.

Porter Exhibit 5

BAYLOR UNIVERSITY
SCHOOL OF LAW
Waco, Texas

February 19, 1954

Mr. Rosser J. Coke,
Coke & Coke
First National Bank Building
Dallas, Texas

Dear Mr. Coke: Re: Estate of Murray Case Sells, deceased. Will Contest.

- - - - It is perhaps true that if the evidence was elicited at a trial, it might encourage someone to contest the Will. This presumes our evidence is weak, and is at variance with your statements to us at our first meeting. But would not payment of a half million dollars on such a questionable claim also encourage another contest?—I recognize that there is danger in any law suit, no matter how sure a party may feel of victory. There is danger that the universities, who are the substantial owners of this fund, might lose it all. It might be well to settle this claim for a half million dollars if we could be sure that there would be no more such nuisance claims. But there is another side to the ledger. The private universities, such as Baylor,

must now obtain donations and bequests from wealthy persons such as Mr. Sells to continue to exist. Publicity concerning easy consent to large payments from such bequests to satisfy questionable claims could do much to discourage future donors who would not care to leave money to a university which would make no fight to preserve the bequest intact. Such publicity could do more harm than the loss of a student loan fund.

Very truly yours,

/s/ Abner V. McCall
Dean, Baylor Law School

AVM/jbn

cc: Mr. George Waverly Briggs
Trust Officer
First National Bank in Dallas

Mr. William M. Brown
Samuels, Brown, Herman & Scott
Electric Building
Fort Worth, Texas

Mrs. Marietta McGregor Creel
Assistant Attorney General
Austin, Texas

Mr. Cecil A. Morgan
Morgan & Shropshire
806 First National Bank Building
Fort Worth, Texas

Mr. John W. Porter
630 Equity Building,
Muskogee, Oklahoma

Mr. Robert G. Storey, Jr.,
Storey, Armstrong & Steger
12th Floor, Republic Bank Building
Dallas 2, Texas

FILE COPY

No. 690

FILED
MAR 14 1960
JOHN T. BROWNING, Clerk

In the Supreme Court of the United States

October Term, 1959

JOHN W. PORTER, JR., and JNO. W. PORTER, also known as JOHN W. PORTER, both individually and as sole partners doing business as the law firm of PORTER & PORTER, *Petitioners*,

vs.

OKLAHOMA BACONE COLLEGE TRUST, JOHN BROWN UNIVERSITY, TEXAS CHRISTIAN UNIVERSITY, TEXAS WESLEYAN COLLEGE, UNIVERSITY OF TEXAS, TEXAS A. & M. COLLEGE, SOUTHERN METHODIST UNIVERSITY, BAYLOR UNIVERSITY, OKLAHOMA A. & M. COLLEGE now Oklahoma State University, UNIVERSITY OF OKLAHOMA, THE GENERAL BOARD OF EDUCATION OF THE METHODIST CHURCH OF NASHVILLE, TENNESSEE, FIRST NATIONAL BANK IN DALLAS as Independent Executor of the Estate (in Texas) of Murray Case Sells, deceased, THE FIRST NATIONAL BANK AND TRUST COMPANY of Muskogee as Administrator with Will and Codicil annexed of the Estate (in Oklahoma) of Murray Case Sells, deceased, BRUCE BENNETT, as Attorney General of the State of Arkansas, MAC Q. WILLIAMSON as Attorney General of The State of Oklahoma, and WILL WILSON as Attorney General of the State of Texas, *Respondents*.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

A. CARL ROBINSON,
JULIAN B. FITE,
Muskogee, Oklahoma,
Counsel for Respondents.

March, 1960.

Wright Building GUYETTE—ATKINS Tulsa Oklahoma

INDEX

Foreword 1

Statement of the Case 2

The Issues 8

Argument 9

Conclusion 15

TABLE OF CASES

Barnaby v. Baron C. Collier, Inc., 65 F. 2d 864, C. C. A. 8 (Neb.) 12

Boyd v. Mara, 284 S. W. 703, (Tex. Civ. App.) 11

City of Owensboro v. Hardwicke, 24 S. W. 2d 555, 557 (Ky.) 9-10

Cleveland v. Ward 285 S. W. 1063 (Tex.) 11

Hinds v. Superior Court of Seminole Co., 39 P. 2d 530 (Okla.) 11

Kramer v. Sommers, 93 S. W. 2d 460, Tex. Civ. App. (Rev. St. 1925, Arts. 3433-3435) 13

Magnolia Petroleum Co. v. Suits, 43 F. 2d 280, C. C. A. 10 (Okla.) 11

Saley v. Black Panther Oil & Gas Co., 280 Fed. 496, C. C. A. 10 (Okla.) 12

Terrell v. Gotcher, 197 Okl. 650, 174 P. 2d 229 9

Vaughan v. John C. Winston & Co. 83 F. 2d 370, C. C. A. 10 (Okla.) affirming, 11 Fed. Supp. 954.... 11

Wichita Railway and Light Co. v. Public Utilities Co. of the State of Kansas, 260 U. S. 48 12

STATUTES CITED

Article 3433, Vernon's Texas Statutes 12
Article 3434, Vernon's Texas Statutes 12
21 C. J. S., p. 143, Courts, Sec. 93 10
30 C. J. S., p. 414, Equity, Sec. 67 11
35 C. J. S., p. 827, Federal Courts, Sec. 26 11-12
Note 62 A. L. R. 881, Subdiv. II, p. 882 14
Supp. Note 124 A. L. R. 1237, Subdiv. II, p. 1238 14

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In the Supreme Court of the United States.

October Term, 1959

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vs.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Respondents, above named, with the exception of The First National Bank and Trust Company of Muskogee, as Administrator with Will and Codicil annexed of

the Estate (in Oklahoma) of Murray Case Sells, deceased, respectfully show to this Honorable Court, that the petition for writ of certiorari filed herein should be denied. Since the statement of the case in the petition filed is more than a little garbled because of the interspersed opinions and arguments, the Respondents will make a brief statement of the case, followed by a restatement of the issues involved, and an argument as to why this Court should not assume jurisdiction and grant the writ of certiorari. We shall not in this response attempt to argue the merits of this cause, except as to jurisdiction. For purposes of clarity we shall refer to the Petitioners as "the Porters" and the Respondents as "the Colleges" the "Attorneys General of Texas, Oklahoma, and Arkansas" and the "Independent Executor."

Statement of the Case.

Murray Case Sells accumulated an estate of some ten million dollars. For some years he lived in Muskogee, Oklahoma. Subsequently he removed to the State of Texas. At the time of his death he resided in Gregg County, Texas. The great bulk of his estate was in the form of stock in a corporation, Sells Petroleum Company, of which he was, in effect, the sole stockholder. In addition, he owned a relatively small amount of real estate and tangible personal property in the State of Texas. His personal property, consisting of stocks and his tangible personal property, and his Texas real state were subject to administration in the State of Texas. In addition, he left some real estate in the State of Oklahoma of the value of around $80,000.00, and a small amount of real estate in the state of Missouri.

Mr. Sells left a Will and a Co'icil to that Will dated some several months apart. The Will and Codicil were presented for and admitted to probate in the County Court of Gregg County, Texas, the domiciliary probate court having jurisdiction of his estate. Because of the existence of real estate in Oklahoma and in Missouri, ancillary probate proceedings were commenced in those two States. The Will and Codicil were admitted to probate in Oklahoma under the Oklahoma law allowing a certified copy of a Will and the probate thereof in the domiciliary jurisdiction to be admitted to probate in Oklahoma. Both the Will and the Codicil named The First National Bank in Dallas, Texas, as independent executor, and it was duly appointed Independent Executor by the County Court of Gregg County, Texas. This Bank being unable to act as Executor under the laws of the State of Oklahoma, an ancillary administrator with Will and Codicil annexed was appointed in Oklahoma, The First National Bank & Trust Company of Muskogee, Oklahoma.

In Texas there developed a will contest. An alleged heir contested both the Will and the Codicil on the ground that the testator lacked mental capacity. The Independent Executor settled this contest. Then later a second will contest developed. Two heirs contested both the Will and the Codicil on the ground that the testator at the time of execution of these documents lacked mental capacity. Citation was duly issued and served upon the Independent Executor as provided by Texas law.

The Will, aside from some rather minor specific bequests, provided that Mr. Sells' estate should go to establish ten trusts in varying proportions for providing for

student loan funds in the ten colleges which are respondents herein, and for building funds for two of the colleges. The Colleges themselves were made the administrators for the trusts relative to loan funds for students at the respective Colleges. Substantially the same distribution was made in the Codicil; however, the administration of the funds was changed. An overall trust was established with The First National Bank in Dallas, Texas, as the Trustee, and the respective Colleges were given subordinate powers as to allocating the funds going to provide for student loans to students in the respective Colleges (the proportions being the same as the separate trusts under the Will) and as to the building funds with respect to the two Colleges. The Colleges, as interested parties, intervened in the Will contest proceeding and the Attorneys General of the States of Texas, Oklahoma and Arkansas, wherein are located all of the Colleges involved, intervened in their capacities as general supervisors of charitable trusts within their respective states.

A settlement was worked out amongst the contestants, the Independent Executor, the Attorneys General and the Colleges. The Will contest proceeding was duly placed at issue, and trial was had. At this trial attorneys appeared on behalf of the contestants, the Independent Executor and the Colleges. Among the attorneys appearing was John W. Porter, Sr., one of the law firm who are the petitioners herein. Evidence was introduced, which evidence indicated that at the time of the execution of the Will Mr. Sells had testamentary capacity, but that at the time of the execution of the Codicil Mr. Sells' mental

condition had so deteriorated that he no longer had testamentary capacity. A judgment was prepared by agreement amongst all of the attorneys upholding the Will and finding the Codicil invalid. The Court, fully realizing that a settlement had been effected, caused each of the attorneys to be polled in open court as to their agreement with the terms of the proposed judgment. Amongst those polled was John W. Porter, Sr., who was asked and replied as follows:

> "Mr. Erisman: Mr. Porter, do you individually and in your representative capacity, do you recommend this settlement and do you agree to be bound thereby and waive the right to appeal?
>
> "Mr. Porter: In view of all of the facts and circumstances and the evidence introduced, I do."

Substantially the same questions were asked and the same answers given by each of the other attorneys present. The Court then signed the judgment. No appeal was had and the judgment became final.

While these proceedings were being conducted in the State of Texas, the ancillary proceedings in the State of Oklahoma had been completed. The property, as directed in the Will, had all been reduced to cash and was held by the ancillary administrator for distribution. The ancillary administrator had filed its final account and the final account had been approved. After the conclusion of the Texas proceedings, distribution was had in Texas and the Colleges sought distribution of the proportionately small estate remaining in Oklahoma. They sought to have this estate distributed under the Will, exclusive of the Codicil, the same as had been done with the great

bulk of the estate in Texas, on the ground that the Codicil having been declared invalid in Texas, it was likewise invalid in Oklahoma, and, likewise, because a distribution of the relatively small estate in Oklahoma differently from the distribution of the large estate in Texas would be infeasible. All of the specific bequests had been paid in Texas, so that only the residuary beneficiaries under the Will and Codicil were concerned with the Oklahoma estate.

All of the residuary beneficiaries entered their appearance in the cause, as did also the Attorneys General from the States of Texas, Oklahoma and Arkansas, and the Independent Executor and the Ancillary Administrator, and, likewise, the Porters. The Porters resisted the distribution as prayed. Trial was had in the County Court of Muskogee County, the probate court administering the Oklahoma estate, and distribution was directed under the Will exclusive of the Codicil. The Porters appealed this cause to the District Court of Muskogee County. A second trial was had and the order of distribution entered by the County Court of Muskogee County was affirmed. The Porters then appealed to the Supreme Court of the State of Oklahoma.

Because the distribution as prayed involved a trust, possibly without the jurisdiction of the probate courts under the laws of the State of Oklahoma, a plenary cause in equity was commenced by the Colleges in the District Court of Muskogee County, Oklahoma, the Court having general equity jurisdiction. In this cause all the beneficiaries of the residuary estate named in Mr. Sells' Will and

the Codicil thereto were joined as parties, together with the Attorneys General of the States of Texas, Oklahoma and Arkansas, as general overseers of charitable trusts within their respective states. The Porters, the Independent Executor, and the Ancillary Administrator were also made parties. In this cause it was prayed that the Codicil to the Will be declared to be inoperative since it had been declared invalid in the domiciliary jurisdiction, Texas. Also, because it would be infeasible to administer the trust provided for in the Codicil as to the relatively small estate in Oklahoma, the Court was requested to apply the doctrine of approximation and direct that the Oklahoma estate be added to the great bulk of the estate distributed in Texas and added to the trusts provided for in the Will. The Porters answered, asserting the validity of the Codicil. They filed a number of cross-petitions, seeking damages in large sums and a re-collection of the estate distributed in Texas, and that such re-collected estate be administered under the Codicil. They also sought attorney fees allegedly due them from the Independent Executor relative to the Texas proceedings. (Attorney fees had been duly allowed and paid to the Porters as to the Oklahoma proceedings by the County Court of Muskogee County in the ancillary probate matter.)

This last cross-petition the Court dimissed as not being germane to the issues and the cause proceeded to trial as to the principal cause and the cross-petitions of the Porters. The Court found that the Codicil, having been declared invalid in the domiciliary State of Texas, and its probate in Oklahoma having been based on its

probate in the State of Texas, that the Codicil was without effect in the State of Oklahoma. The cross-petitions of the Porters for damages and for re-collection of the estate being based upon the asserted validity of the Codicil, judgment was rendered against the Porters on their cross-petitions. From this judgment the Porters appealed to the Supreme Court of the State of Oklahoma.

In the Supreme Court of the State of Oklahoma the two pending causes were heard together. That Court affirmed the actions of the County Court and the District Court in the probate cause and affirmed the action of the District Court in the equity cause. The Porters, as petitioners herein, seek to have this court review these decisions of the Supreme Court of the State of Oklahoma.

The Issues.

The issues, insofar as they are involved in the Petition for Writ of Certiorari, are narrowed to a single question.—Did the Oklahoma courts, in according to the final judgment of the County Court of Gregg County, Texas, the effect of a final adjudication that the codicil to the Will of Murray Case Sells is invalid, violate the due process clause of the 14th Amendment to the Constitution of the United States?

ARGUMENT.

The Oklahoma Courts held that since the Codicil to Mr. Sells' Will was declared invalid by a court of competent jurisdiction in the state of his domicile, Texas, it thereby became invalid in Oklahoma. Its probate in Oklahoma was based solely upon its probate in the State of Texas. The Codicil was in no way proven in Oklahoma excepting by a certified copy of the Codicil and its probate in the State of Texas. The effect of the Codicil's having been declared invalid in Texas upon the ancillary probate of a copy thereof in Oklahoma based upon the probate of the original in Texas is a matter of state law and not open to review by this Court.

We take it to be axiomatic that a judgment of a court of competent jurisdiction of Texas is entitled to full faith and credit in the State of Oklahoma provided the Texas Court had jurisdiction of the subject matter and of the parties. We realize that a party litigant may not be deprived of his day in court by the Oklahoma Courts recognizing a judgment of a Texas court lacking jurisdiction. However, ordinarily an attack upon the judgment of a court of another state must be a direct attack and not a collateral attack. It was proven at the trial that the law of Texas is that the judgment of a court of competent jurisdiction of that State may not be attacked collaterally. This is likewise the law of the State of Oklahoma.

Terrell v. *Gotcher*, 197 Okl. 650, 174 P. 2d 229.

This is the general law of the land. In the case of *City of Owensboro* v. *Hardwicke*, 24 S. W. 2d 555 (Ky.), which is closely in point, a judgment refusing probate of a will, was

attacked in another proceeding. The court refused to consider such attack, stating simply at page 557:

> "The Circuit Court had jurisdiction of the will contest and its judgment is valid until vacated or reversed * * *. If it be assumed that the judgment is voidable, the fact remains that it was not subject to a collateral attack."

Since the judgment of the County Court of Gregg County, Texas, could not be attacked collaterally in Texas, it cannot be so attacked in Oklahoma.

However, even if the Oklahoma courts could have inquired in this collateral proceeding as to jurisdiction of the County Court of Gregg County, Texas, such inquiry could but have resulted in the decision that that court had jurisdiction. Insofar as jurisdiction of the subject matter is concerned there appears to be no contest but that the County Court of Gregg County, Texas, was a court of competent jurisdiction empowered to invalidate wills previously admitted to probate therein upon proper showing. Such court undoubtedly had jurisdiction of the proceedings brought to invalidate the probate of the Will and the Codicil in Texas. The Porters argue that since the Will was upheld, the County Court of Gregg County, Texas, had no jurisdiction to invalidate the Codicil since this could in no wise benefit the contestants. However, such is not the law.

Once the jurisdiction of a court has attached it will not be divested by subsequent events or the failure of the parties bringing the cause to obtain the relief asked for. In 21 C. J. S. at page 143, Courts, Sec. 93, appears the statement:

"As a general rule jurisdiction once acquired is not defeated by subsequent events, even though they are of such a character as would have prevented jurisdiction from attaching in the first instance."

Cases so holding are *Hinds* v. *Superior Court of Seminole Co.*, 39 P. 2d 530 (Okla.); *Cleveland* v. *Ward*, 285 S. W. 1063 (Tex.); and *Boyd* v. *Mara*, 284 S. W. 703, (Tex. Civ. App.).

In 30 C. J. S. at page 414, Equity, Sec. 67, it is stated:

"* * * it is a well settled rule that a court of equity which has obtained jurisdiction of the controversy on any ground, or for any purpose will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject matter."

Citing *Vaughan* v. *John C. Winston & Co.*, 83 F. 2d 370, C. C. A. 10 (Okla.), affirming, 11 Fed. Supp. 954; *Magnolia Petroleum Co.* v. *Suits*, 43 F. 2d 280, C. C. A. 10 (Okla.); and *Cleveland* v. *Ward*, 285 S. W. 1063 (Tex.).

Further along, at page 419, the text continues:

"* * * The fact that necessity for the relief originally asked for may disappear pending the proceedings does not destroy the vested jurisdiction of the court to retain the case for complete disposition of all rights and obligations of the parties, and the court may retain jurisdiction despite the complainant's decision at the hearing not to ask for the relief originally sought * * *."

This same situation often comes up with regard to jurisdiction of the Federal Courts. In 35 C. J. S., at page 827, Federal Courts, Sec. 26, the text states:

"As a general rule, where the jurisdiction of a federal court has once attached it is not subject to be divested by subsequent events or extraneous matters."

Examples are: Reduction of the claim below the jurisdictional minimum, *Barnaby* v. *Baron C. Collier, Inc.*, 65 F. 2d 864, C. C. A. 8 (Neb.); Change of parties, *Saley* v. *Black Panther Oil & Gas Co.*, 280 Fed. 496, C. C. A. 10 (Okla.); Change of citizenship, doing away with diversity upon which jurisdiction was based, *Wichita Railway and Light Co.* v. *Public Utilities Company of the State of Kansas*, 260 U. S. 48.

Certainly the County Court of Gregg County, Texas, had the jurisdiction to entertain a suit by the heirs to set aside Mr. Sells' Will and the Codicil thereto. The fact that the Court concluded that the Will should not be set aside in nowise deprived it of jurisdiction to set aside the Codicil, even though such an action by the court would lend no support to the heirs' claim of inheritance.

The County Court of Gregg County, Texas, had jurisdiction of the subject matter.

We turn then to the question of jurisdiction of the parties. No question is raised but that the Will contest proceeding in the County Court of Gregg County, Texas, was regularly commenced as provided by the Texas law. Such proceedings are by application to annul the provisions of a will. Article 3433, Vernon's Texas Statutes. Article 3434, Vernon's Texas Statutes, provides the procedure with respect thereto.

> "Upon filing of such application the Clerk shall issue a citation for the executor or administrator to appear at a regular term of such Court, and answer such application. The substance of the application shall be stated in the citation * * *."

This Statute has been construed by the Texas courts and they have held that the Executor or Administrator is the only person upon whom the citation must be served. In the case of *Kramer* v. *Sommers*, 93 S. W. 2d 460, Texas Civil Appeals, the Court holds in the first paragraph of the syllabus:

> "Where suit was brought under statute authorizing attack on Will which has been probated, by which statute executor is made legal representative of all persons interested in Will, common-law rule that all interested persons must be made parties to suit held inapplicable, executor being only necessary party to the suit." (Rev. St. 1925, Arts. 3433-3435.)

In the body of the opinion the Court states:

> "The application filed in the county court was expressly authorized by the provisions of Articles 3433, 3434 and 3435, and in Article 3434 the executor or administrator is the only person named upon whom citation must be served. That was a special statutory procedure in which the executor was made the legal representative of all persons interested in the estate. *Lyons-Thomas Hardware Co.* v. *Perry Stove Mfg. Co.*, 88 Tex. 468, 27 S. W. 100. And the proceeding being statutory, there is no basis for application of the common-law rule that all persons whose interests are to be affected must be made parties to the suit. It is, therefore, clear that there was no lack of necessary parties. *Allardyce* v. *Hambleton*, (Tex. Civ. App.) 68 S. W. 834, 835; *Allardyce* v. *Hambleton*, 96 Tex. 30, 70 S. W. 76; *Anderson* v. *Menefee*, (Tex. Civ. App.) 174 S. W. 904 (writ denied); *Keller* v. *Corpus Christi*, 50 Tex. 614, 32 Am. Rep. 613; *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356, 28 S. Ct. 726, 52 L. Ed. 1096; *Middleton Nat'l Bank* v. *Toledo, A. A. & N. M. R. Co.*, 197 U. S. 395, 25 S. Ct. 462, 49 L. Ed. 803; 1 Corpus Juris, Sec. 102, p. 989."

There is no contention made but that the citation was duly issued by the Clerk and duly served upon the Independent Executor. Thus, the necessary process was had and the only person necessary to be before the Court, the Independent Executor, was brought before the Court.

However, the joinder of parties did not stop at this point. Actually, all of the interested parties were represented at the trial of the cause in the County Court of Gregg County. The Independent Executor was present. The Colleges were present. The indefinite beneficiaries of the charitable trusts set up in the Will and the Codicil were present through the Attorneys General of the States of Texas, Oklahoma and Arkansas, who are the persons empowered by law to represent such beneficiaries, and such trusts.

See Note 62 A. L. R. 881, Subdivision II at page 882, and Supplementary Note 124 A. L. R. 1237, Subdivision II, at page 1238.

If, as the Porters maintain, they have some standing over and beyond that of simply attorneys in the case, they were present before the Court in the person of John W. Porter, Sr. Each of the parties acquiesced in the judgment rendered by the County Court of Gregg County, Texas, invalidating and annulling the Codicil.

The Court had full jurisdiction of the parties.

It follows then that the judgment of the County Court of Gregg County, Texas, was rendered in all proper accord with recognized due process of law. It had jurisdic-

tion of the subject matter and of the parties, and the judgment was rendered as the result of a trial had upon regular setting with all parties present.

Conclusion.

Far from this being a case in which this Court should exercise its discretionary power to grant a writ of certiorari, it is a case in which, if this Court were to grant such a writ of certiorari, it would have to find that there has been no violation of the Constitution or the laws of the United States. The petition for writ of certiorari should be denied.

Respectfully submitted,

A. CARL ROBINSON,
JULIAN B. FITE,

Muskogee, Oklahoma,
Counsel for Respondents.

FILE COPY

Office Supreme Court, U.S.
FILED
APR 21 1960
JAMES R. BROWNING, Clerk

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 690

JOHN W. PORTER, JR. and JNO. W. PORTER also known as JOHN W. PORTER, both individually and as sole partners doing business as the law firm of Porter & Porter,

Petitioners,

VERSUS

OKLAHOMA BACONE COLLEGE TRUST, JOHN BROWN UNIVERSITY, TEXAS CHRISTIAN UNIVERSITY, TEXAS WESLEYAN COLLEGE, UNIVERSITY OF TEXAS, TEXAS A. & M. COLLEGE, SOUTHERN METHODIST UNIVERSITY, BAYLOR UNIVERSITY, OKLAHOMA A. & M. COLLEGE now OKLAHOMA STATE UNIVERSITY, UNIVERSITY OF OKLAHOMA, THE GENERAL BOARD OF EDUCATION OF THE METHODIST CHURCH OF NASHVILLE, TENNESSEE, FIRST NATIONAL BANK IN DALLAS as Independent Executor of the Estate (in Texas) of Murray Case Sells, deceased, THE FIRST NATIONAL BANK AND TRUST COMPANY OF MUSKOGEE as Administrator with Will and Codicil annexed of the Estate (in Oklahoma) of Murray Case Sells, deceased, BRUCE BENNETT as Attorney General of the State of Arkansas, MAC Q. WILLIAMSON as Attorney General of The State of Oklahoma, and WILL WILSON as Attorney General of the State of Texas,

Respondents.

PETITION FOR REHEARING

JOHN W. PORTER, JR. of
PORTER & PORTER,
630 Equity Building,
Muskogee, Oklahoma,
Counsel for Petitioners.

April, 1960.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-8750

SUBJECT INDEX

	PAGE
Petition for Rehearing	1
Certificate of Counsel	5

AUTHORITIES

CASES:

Townsend v. Winburn, 177 N.Y.S. 757, 107 Misc. 443	3
Wetmore v. Porter, 92 N.Y. 76, 19 N.Y. Court of Appeals 225	3

TEXTBOOKS:

Bogert on Trusts, Sec. 746, p. 628	3
Bogert on Trusts, Sec. 747, p. 635	3
90 C.J.S. "Trusts", Sec. 246, p. 220	3
2 Perry on Trusts (4th Ed.), Sec. 815	3
Restatement of the Law (American Law Inst.) "Trusts" Sec. 294, p. 899	2

In the
Supreme Court of the United States
OCTOBER TERM, 1959

No. 690

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Respondents.

PETITION FOR REHEARING

Come now the above named petitioners in their personal capacities as well as their trust capacities herein, and show that the Supreme Court of the United States

did on March 28, 1960, deny their Petition for Writ of Certiorari herein (declined to accept jurisdiction herein), and said petitioners therefore petition and pray said Court herein under its Rule 58 to reconsider the matter and accept jurisdiction of their said Petition for Writ of Certiorari, and for additional reason allege and state:

If it was the duty of petitioner Jno. W. Porter in his "watchdog" trust capacity to defend and uphold the Codicil trust involved when it was cancelled in the second Texas contest; and if it be contended that he had the opportunity to so defend the Codicil trust, and that he failed to do so, and that he was accordingly bound thereby in the later Oklahoma proceedings herein, as was so held by the Oklahoma Supreme Court; then in opposition thereto, we urge the new point that the law provides for the opportunity and remedy said "watchdog" trustee sought herein in the Oklahoma courts to recover the trust assets and have the Codicil trust reinstated (*Locus Poenitentiae*):

> "Not only can the beneficiary maintain a suit against a transferee of trust property who is not a bona fide purchaser, but the trustee himself can maintain a suit against the transferee. Although the trustee if he held the property free of the trust would have no cause of action against the transferee, he is permitted to maintain a suit for the benefit of the trust estate. Although the trustee bases his cause of action upon his own voluntary act and even though the act was knowingly done in breach of his duty to the beneficiary, he is permitted to maintain the action since the purpose of the action is to recover money or other property for the trust estate—" Restatement of the Law (American Law Inst.) "Trusts" Sec. 294, page 899.

"Where the sale was in breach of trust, the trustee may according to the majority view repent of his wrongdoing and sue to avoid the transfer." Bogert on Trusts, Sec. 746, page 628.

"The wrongdoing trustee has a duty to secure the return of the property from the wrongful purchaser." Bogert on Trusts, Sec. 747, page 635.

"If a trustee exceeds his powers, his acts are a nullity, and, in the absence of other considerations, are ordinarily without force and effect, and acts done in contravention of the trust and not authorized by statute are void. A trustee who has been guilty even of an intentional fault is entitled to his *locus poenitentiae* and an opportunity to repair the wrong committed." 90 C.J.S. "Trusts", Sec. 246, page 220.

"Whoever receives property knowing that it is transferred to him in violation of a trust, takes it subject to the right not only of the *cestui*, but also of the trustee, to reclaim possession." 2 Perry on Trusts (4th Ed.), Sec. 815.

—*Wetmore* v. *Porter*, 92 N.Y. 76, 19 N.Y. Court of Appeals 225;

Townsend v. *Winburn*, 177 N.Y.S. 757, 107 Misc. 443.

We did not present this new point in our Petition for Writ of Certiorari, because we there took the view that Jno. W. Porter was present in the Texas cancellation only in the capacity as attorney for the Texas Executor, and in no other capacity, all as therein fully explained. We there took the view that the law would not compel Jno. W. Porter to simultaneously represent two conflicting interests—the Executor that he had represented from the start,

and the "watchdog" trustee who had never had occasion to act. That since he appeared in the Texas cancellation only as attorney for the Texas Executor to carry out its wish to help the schools purportedly destroy the Codicil to save its own skin, contrary to his legal advice to it; he would not be compelled to simultaneously appear there and act and be bound also as the "watchdog" trustee of the Codicil when it would have been his trust duty to defend the Codicil containing the trust. However, since this Supreme Court of the United States denied certiorari herein, it might have rejected this view and taken a different view, and so all we can do now is urge this new point of *Locus Poenitentiae* and the point urged in the next paragraph. A trustee should be afforded as many opportunities as necessary to the end of saving and recouping the trust he is assigned to guard and carry out, particularly when there is no just reason to deny such or when he has previously been unable to freely act. Courts should do all possible to help recoup and protect educational trusts such as the Codicil involved. Also:

This Court in repeated criminal cases year after year gets quite exercised about prolonging the physical existence of a few persons convicted of crimes—saving them from the electric chair or gas chamber, because of some constitutional protection. This may be a worthy cause as far as it goes, but the end result is very problematical as to any general betterment of the public. This may save a few lives, and give a limited education on constitutional law. But would it not be wiser for the Court to get exercised about the constitutional protection and preservation of educational trusts such as this Codicil, to better educate

future citizens, parents, religious leaders, teachers, doctors, statesmen, psychiatrists and scientists, so there would be less crime—and to better educate future judges and lawyers, so there would be less violation of the Constitution? In other words, would it not be wiser to follow the rule that an ounce of prevention is worth a pound of cure? It may be important to be concerned about the judicial proceedings against a few purported criminals; but is it not more important to be concerned about educational trusts for the benefit of the deserving young men and women of our Nation, to the end of saving lives and souls and constitutional rights and privileges on a much larger scale? These deserving young men and women may well save our Nation by reason of such better education. Is it not important to get exercised about their constitutional rights and protection? They are the beneficiaries of the Codicil trust that the "watchdog" trustee is now asking this Court to reinstate and recoup for them. Is this asking too much? Isn't this a worthy case?

Respectfully submitted,

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630 Equity Building,
Muskogee, Oklahoma,
Counsel for Petitioners.

April, 1960.

CERTIFICATE OF COUNSEL

This is to certify that this petition for rehearing is presented in good faith and not for delay, and that the foregoing points of *Locus Poenitentiae* and an ounce of

prevention is worth a pound of cure are the only points urged herein and they were not presented in the Petition for Writ of Certiorari heretofore filed in this case, and copies of this petition for rehearing were delivered to and served on opposing counsel Julian B. Fite and A. Carl Robinson and mailed to the three Attorneys General respondents herein this April , 1960.

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